(22,222)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 75.

J. THORBURN ROSS, PLAINTIFF IN ERROR,

vs.

THE STATE OF OREGON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

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a In the Circuit Court of the State of Oregon for Marion County, Department No. 1.

#9001.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, GEORGE H. HILL, JOHN E. AITCHISON, and T. T. BURKHART, Defendants.

(Endorsed:) Case No. 6956, Drawer No. 614. Filed Jul- 29, 1908. J. C. Moreland, Clerk.

Appeal to the Supreme Court of the State of Oregon from Marion County.

STATE OF OREGON, Respondent,
—.
J. THORBURN ROSS, Appellant.

John Manning, B. E. Haney, M. L. Pipes and C. L. McNary, Attorneys for State.
Wallace McCamant, and W. M. Kaiser, Attorneys for Appellant.

b In the Circuit Court of the State of Oregon for the County of Marion.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, GEORGE H. HILL, JOHN E. AITCHISON, and T. T. BURKHART, Defendants.

Be it remembered that at a regular term of the Circuit Court of the State of Oregon, for the County of Multnomah, begun and held at the County Court House in the City of Portland, in said County and State on Monday, the 2nd day of March, A. D. 1908 the same being the First Monday in said month, and the time fixed by law for holding a regular term of said Court.

Present; Hons. Earl C. Bronaugh, Thos. O'Day, John B. Cleland and C. U. Gantenbein, Judges, whereupon on the 6th day of March, A. D. 1908, the following Information was found by the District Attorney of the Fourth Judicial District and filed in the above entitled Court, of which the following is a true copy, to-wit:

1 In the Circuit Court of the State of Oregon for Multnomah County.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, GEORGE H. HILL, JOHN E. AITCHISON, and T. T. BURKHART, Defendants.

Information.

The Defendants J. Thorburn Ross, George H. Hill, John E. Aitchison and T. T. Burkhart, are accused by the District Attorney of the Fourth Judicial District of the State of Oregon, by this Information, of the crime of larceny committed by converting to their own use money in their possession belonging to the State of Oregon, in violation of Section 1807 of Bellinger & Cotton's Annotated Codes & Statutes of the State of Oregon.

That on the 9th day of September, A. D. 1907, in the County of Multnomah and State of Oregon, the Title Guarantee & Trust Company was then and there a corporation organized and existing under the laws of the State of Oregon and then and there carrying on a banking business and conducting a bank in the State and County aforesaid; that the Defendant J. Thorburn Ross, was then and there the duly elected and acting president, and a duly elected and acting director of the said corporation; that the defendant T. T. Burkhart was then and there the duly elected and acting Treasurer and a duly — and acting director of the said corporation; that the said George H. Hill was then and there the duly elected and acting Vice President of the said corporation, and a duly elected and acting director thereof, and the said John E. Aitchison was then and there a duly elected and acting director of the said corporation; and the said Defendants were then and there a majority of the Board of Directors of said corporation.

That the said Defendants J. Thorburn Ross, George H.
2 Hill, John E. Aitchison, and T. T. Burkhart, on the 9th day of September, A. D. 1907, and in the County and State aforesaid, then and there being, and then and there pretending to act for, and on behalf of the said The Title Guarantee & Trust Company, did then and there have in their possession and under their control as officers and directors of the said The Title Guarantee & Trust Company, as aforesaid, $288,426.87, then and there belonging to the State of Oregon, and then and there in the possession and under the control of the said Defendants as aforesaid for the said State of Oregon and for safe keeping and to be returned by the said defendants to the said State and to the legal custodians of said money upon legal demand therefor, the said money being then and there lawful money of the United States of America and Bank Notes a more particular description of which is to the District Attorney unknown, and then and there of the value of $288,426.87, and which said money then and there belonged to and

was a part of the Irreducible School Fund, and of the Agricultural College Fund and of the University Fund of said State; the said Defendants and each of them then and there well knowing that the said money so belonged to the said State and to the said Irreducible School Fund, and said Agricultural College Fund and to the said University Fund of the said State as aforesaid; and the said defendants then and there having possession of the said money as aforesaid, belonging to the said State and to the said funds as aforesaid and for the State as aforesaid and for safe keeping and to be returned to the said *Said* State and to the legal custodians of said money, upon legal demand therefore as aforesaid, did then and there wilfully, unlawfully, feloniously and knowingly convert the same to their own use, the said defendants then and there well knowing that the said money so in their possession as aforesaid was then and there money belonging to the State of Oregon and to the Irreducible School Fund and to the Agricultural College Fund, and to the University Fund of the said State as aforesaid, and which said money the said defendants before the said 9th day of September, A. D. 1907, pertaining to act for and on behalf
3 of the said The Title Guarantee & Trust Company, and as officers of the said The Title Guarantee & Trust Company as aforesaid, had received for the State of Oregon from the said George A. Steel for the State of Oregon, and for safe keeping to be returned by them, the said defendants, to the said George A. Steel as State Treasurer or to his successors in office, and to the State of Oregon, the said money at the time it was received as aforesaid, belonging to the said State of Oregon, and to the Irreducible School Fund, and to the University Fund, and to the Agricultural College Fund, of said State, all of which facts the defendants at the time they so received the said money as aforesaid well knew, and the said George A. Steel being at the time said defendants received said money as aforesaid the duly elected and acting Treasurer of said State of Oregon, and as such Treasurer the legal custodian of the said money contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

Dated at the City of Portland, in the County aforesaid, this Sixth day of March, A. D. 1908.

JOHN MANNING,
District Attorney of the Fourth Judicial District of the State of Oregon.

Witnesses subpœnaed, sworn and examined by the District Attorney in and for the State of Oregon.

J. W. Ferguson, Geo. Black, Geo. A. Steele.

4 "Endorsed": In the Circuit Court of the State of Oregon in and for Multnomah County. State of Oregon, Plaintiff, vs. J. Thornburn Ross. A true Information. John Manning, District Attorney. Office of County Clerk. Filed Mar. 6th, 1908. J. S. Fields, Clerk. By H. C. Smith, Deputy.

5 Be it remembered, That at a regular Term of the Circuit Court of the State of Oregon, for the County of Multnomah, begun and held at the County Court House in the City of Portland, in said County and State on Monday, the 2" day of March, A. D. 1908, the same being the First Monday in said month, and the time fixed by law for holding a regular Term of said Court.

Present: Hons. Earl C. Bronaugh, Thos. O'Day, John B. Cleland, C. U. Gantenbein, Judges.

Whereupon on this Friday the 6th day of March, A. D. 1908, the same being the 5th Judicial day of said term of said Court, among other proceedings the following were had, to-wit:

C. 758.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, GEORGE H. HILL, JOHN E. AITCHISON and T. T. BURKHART, Defendants.

Now at this time comes the State of Oregon, by John Manning, District Attorney, the Defendant J. Thorburn Ross, appearing in person and by his attorney Wallace McCamant, and the defendants John E. Aitchison and T. T. Burkhart appearing in person and by their attorney Harrison Allen, and an information having been heretofore, to-wit: on the 6th day of March, 1908, duly presented to the Court by the District Attorney of the Fourth Judicial District of the State of Oregon, for the County of Multnomah, and filed with the clerk, charging said defendants with the crime of larceny committed in said County and State on the 9th day of September, 1907.

Said Defendants J. Thorburn Ross, John E. Aitchison and T. T. Burkhart now duly arraigned by the District Attorney under the Court's direction, reading said information to the defendants, and delivered to said defendants a certified copy of said information, and the endorsements thereon, including the list of witnesses

6 endorsed on said Information.

The defendants state that they are correctly named, upon motion of the Attorneys for said defendants, it is ordered that said defendants have until the 12th day of March, 1908, in which to move, demur, or plead to the information.

(Signed) JOHN B. CLELAND, *Judge.*

"Endorsed:" C. 758. State vs. Ross et al. 3-6-'08.

7 And afterwards on the 12th day of March, 1908, the Defendant J. Thorburn Ross files a motion to quash and dismiss as follows,

In the Circuit Court of the State of Oregon for Multnomah County.

No. 758.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS et al., Defendants.

Comes now the Defendant J. Thorburn Ross by his Attorney, Wallace McCamant, and moves the Court to quash and dismiss the Information filed herein for the following reasons:

1st. For the reason that the examination of witnesses on which the same purports to be based was made on legal holidays between the 6th day of November and the 14th day of December, 1907.

2nd. That the names of the witnesses examined by the District Attorney are not all endorsed on the Information.

In support of this motion the defendant files herewith certain affidavits, and this defendant also asks leave on the hearing of this motion to call the District Attorney as a witness and examine him with reference to the time at which the investigation leading up to this Information was made and the names of the witnesses who were examined by him.

WALLACE McCAMANT,
Attorney for Defendant J. Thorburn Ross.

8 COUNTY OF MULTNOMAH,
State of Oregon, ss:

Due service of the within Motion is admitted this 12th day of Mar., 1908.

JOHN MANNING,
District Attorney.

"Endorsed:" # 758. In the Circuit Court of the State of Oregon for Multnomah County. State of Oregon, Plaintiff, vs. J. Thorburn Ross et al., Defendants. Motion. Office of County Clerk. Filed March 12th, 1908. F. S. Fields, Clerk, by R. A. Ried, Deputy. Wallace McCamant, Attorney for Defendant, J. Thorburn Ross.

9 Be it remembered, That at a Regular Term of the Circuit Court of the State of Oregon, for the County of Multnomah, begun and held at the County Court House in the City of Portland, in said County and State of Monday, the 2" day of March, A. D. 1908, the same being the First Monday in said month, and the time fixed by law for holding a regular term of said court.

Present: Hons. Earl C. Bronaugh, Thos. O'Day, John B. Cleland and C. U. Gantenbein, Judges.

Whereupon on this Saturday the 14th day of March, A. D. 1908, the same being the 12th Judicial day of said term of said Court, among other proceedings the following was had, to-wit:

C. 758.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, GEORGE H. HILL, JOHN E. AITCHISON and T. T. BURKHART, Defendants.

Now at this time this cause coming on to be heard on the separate motions filed herein by the defendants, to quash and set aside the Information, and the defendant J. Thorburn Ross, appearing by Wallace McCamant, of Attorneys, and the Defendants John E. Aitchison and T. T. Burkhart, appearing by Harrison Allen, of Attorneys.

And the Court having heard the arguments of the attorneys for and against the motions, and being fully advised in the premises, it is ordered that said motions, and each of them, is hereby denied, and defendants are allowed until the 16th day of March, 1908, in which to demur or plead to the Information herein.

(Signed) JOHN B. CLELAND, *Judge.*

"Endorsed:" C. 758. State vs. Ross et al. 3-14-08.

And afterwawrds on the 16th day of March, 1908, the defendant J. Thorburn Ross, demurs to the Information herein which reads following:

In the Circuit Court of the State of Oregon for Multnomah County.

* * * * * * *

758.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, GEORGE H. HILL, JOHN E. AITCHISON and T. T. BURKHART, Defendants.

Comes now the Defendant, J. Thorburn Ross, by his Attorney Wallace McCamant, and demurs to the Information hereon on the following grounds, to-wit:

I.

That the same does not conform substantially to the requirements of Chapter 8 of Title 18 of the Code.

II.

That the same does not state the particular circumstances of the crime charged, and that the same is not direct or certain as regards

the receipt or possession of the moneys referred to in the Information.

III.

That the same does not state facts sufficient to constitute a crime.

WALLACE McCAMANT,
Attorney for Defendant, J. Thorburn Ross.

COUNTY OF MULTNOMAH,
State of Oregon, ss:

Due service of the within —— is admitted this — day of ——, 190–.

JOHN MANNING,
District Attorney for 4th Jud. Dist.,
By B. E. HANEY, *Deputy.*

11 "Endorsed:" # 758. In the Circuit Court of the State of Oregon for Multnomah County. State of Oregon, Plaintiff, vs. J. Thorburn Ross et al., Defendants. Demurrer to Information. Office of County Clerk. Filed Mar. 16, 1908. F. S. Fields, Clerk, by R. A. Reid, Deputy, Snow & McCamant, Attorneys for Defendant.

12 Be it remembered, That a regular Term of the Circuit Court of the State of Oregon, for the County of Multnomah, began and held at the County Court House in the City of Portland, in said County and State on Monday, the 2nd day of March, A. D. 1908, the same being the First Monday in said month, and the time fixed by law for holding a regular term of said Court.

Present: Hons. Earl C. Bronaugh, Thos. O'Day, John B. Cleland, and C. U. Gantenbein, Judges.

Whereupon, on this Thursday, the 19th day of March, A. D. 1908, the same being the 16th Judicial Day of said term of said Court among other proceedings [illegible]wing was had to-wit:

C. 758.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, GEORGE H. HILL, JOHN E. AITCHISON and T. T. BURKHART, Defendants.

Now at this time this cause coming on for hearing on the separate demurrers filed herein by the Defendants, to the information the State of Oregon appearing by John Manning, District Attorney, and the defendant J. Thorburn Ross, appearing by Wallace McCamant of attorneys, and the Defendants John E. Aitchison and T. T. Burkhart, appearing by Harrison Allen, of Attorneys.

After hearing the arguments of the respective Attorneys, and the Court not being fully advised in the premises takes said demurrers under advisement.

(Signed) JOHN B. CLELAND, *Judge.*

"Endorsed:" C. 758. State vs. Ross et al. 3-19-'08."

13 Be it remembered, That at a Regular Term of the Circuit Court of the State of Oregon, for the County of Multnomah, begun and held at the County Court House in the City of Portland, in said County and State on Monday, the 2nd day of March, A. D. 1908, the same being the First Monday in said Month, and the time fixed by law for holding a regular term of said Court.

Present: Hons. Earl C. Bronaugh, Thos. O'Day, John B. Cleland and C. U. Gantenbein, Judges.

Whereupon, on this Tuesday, the 24th day of March, A. D. 1908, the same being the 20th Judicial day of said term of said Court among other proceedings the following was had, to-wit:

C. 758.

STATE OF OREGON, Plaintiff,

vs.

J. THORBURN ROSS, GEORGE H. HILL, JOHN E. AITCHISON and T. T. BURKHART, Defendants.

Compared.

This cause having been heretofore argued and submitted on the separate demurrers filed herein by the defendants, to the Information, and by the court then reserved for further consideration, and the Court having duly considered all the questions raised by said demurrers, and the arguments on the respective attorneys thereon, and being now fully advised in the premises.

It is ordered that said demurrers and each of them be and the same is hereby overruled.

(Signed) JOHN B. CLELAND, *Judge.*

"Endorsed:" C. 758. State vs. Ross et al. 3-24-'08. 169/443.

14 Be it remembered that at a regular Term of the Circuit Court of the State of Oregon, for the County of Multnomah, begun and held at the County Court House in the City of Portland, in said County and State on Monday, the 2" day of March, A. D. 1908, the same being the First Monday in said month and the time fixed by law for holding a regular term of said court.

Present: Hons. Earl C. Bronaugh, Thos. O'Day, John B. Cleland and C. U. Gantenbein, Judges.

Whereupon, on this Tuesday the 24th day of March, A. D. 1908, the same being the 20th Judicial Day of said term of said court among other proceedings the following was had, to-wit:

C. 758.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, GEORGE H. HILL, JOHN E. AITCHISON and T. T. BURKHART, Defendants.

Compared.

Now at this time comes the State of Oregon, by John Manning, District Attorney, and the defendant J. Thorburn Ross, appearing in person, and by Wallace McCamant, of his attorneys, and the defendants John E. Aitchison and T. T. Burkhart, appearing in person, and by Harrison Allen, of their attorneys, and the defendants having been heretofore duly arraigned upon this information the Defendants J. Thorburn Ross, John E. Aitchison, and T. T. Burkhart each for himself, pleads that he is not guilty of the crime charged in the Information.

It is ordered that the plea of said defendants of not guilty be and the same is hereby entered of record.

(Signed) JOHN B. CLELAND, *Judge*.

"Endorsed:" C. 758. State vs. Ross et al. 3-24-'08. 169/443.

And afterwards on the 27th day of March, 1908, the Defendant filed herein a bill of exceptions which reads as follows, to-wit:

In the Circuit Court of the State of Oregon for Multnomah County.

758.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, GEORGE H. HILL, JOHN E. AITCHISON and T. T. BURKHART, Defendants.

Be it remembered that on the 14th day of March, 1908, this cause came on to be heard on the motions of the Defendants to quash and dismiss the Information herein, and the State appeared by John Manning, District Attorney, the defendant J. Thorburn Ross, by Wallace McCamant, his Attorney, and the Defendants John E. Aitchison and T. T. Burkhart by Harrison Allen, their Attorney.

Thereupon the defendants submitted to the Court an affidavit duly sworn to by C. H. Sholes and duly filed in this court and cause which omitting the formal part was as follows:

"I, C. H. SHOLES, being duly sworn depose and say that I am a member of the firm of Sholes, Boys and Person, the official Court reporters; that on the 17th day of January, 1908, at the hour of 2:00 o'clock P. M., I appeared in Department No. 8 of the above entitled Court for the purpose of reporting the testimony of John Manning, which testimony was taken in four criminal cases entitled as above; that the said John Manning testified in part as follows:

Q. Now, Mr. Manning, you had Mr. M. B. Rankin before you, did you not?

A. Yes.

Q. And you conferred with him as to whether or not crime had been committed by these defendants in connection with the affairs of the Title Guarantee & Trust Company?

A. I will answer that question in this way, Mr. McCamant, I had Mr. Rankin before me for the purpose of obtaining from
16 Mr. Rankin any facts that I could pertaining to his transactions with the Title Guarantee & Trust Company that might throw any light on the transactions that took place between himself, Mr. Ross, Mr. Burkhart and the Bank officials where a crime had been committed, but I never put him under oath.

Q. You had several interviews with him?

A. Yes, sir.

Q. And that was the purpose of all of them?

A. Yes, sir.

Q. You had some interviews with George A. Steel, had you not?

A. I had two interviews with George A. Steel at my request and several others at his own request.

Q. Where did those interviews which took place with George A. Steel at your request occur?

A. In my office.

Q. He came there twice at your request?

A. Yes, sir.

Q. And you talked with him about the question of the public funds in the Title Guarantee and Trust Company?

A. Yes, sir.

Q. You were at that time investigating the case as to whether a crime had been committed in connection with the school fund of the State of Oregon and the placing of the same in the Title Guarantee & Trust Company?

A. I was getting whatever evidence I could against the Title Guarantee & Trust Company wherever I could get it.

Q. And with reference to the school fund and of these particular defendants with that fund?

A. I think I have talked with Mr. Steel but very little about the school fund until just before the 6th of January.

Q. But you did at that time talk with him upon that subject?

A. I don't think I ever asked him but one question on that subject in my life. I don't think—I am not positive but I don't think

I ever asked him but one question with reference to that sub-
17 ject.

Q. That particular fund?

A. That particular fund, and that was with reference to the demand and he said he had made a demand.

Q. And he answered that question?

A. Now, let me tell you Mr. McCamant, just exactly the conversation that is to say the particular things I did speak to Mr. Steel about. Mr. Steel asked to see me two or three times himself and I asked to see Mr. Steel a couple of times. My conversation with Mr. Steel each and every time with but one or two exceptions, was with reference to the connection he himself had to the Title Guarantee & Trust Company and therefore I was precluded from putting him under oath. There was only one time that I remember of now—I won't be positive of this—that I asked him anything pertaining to the cases which these defendants are indicted for, I can tell you now, so that you may know, as to whether he made a demand on the Title Guarantee & Trust Company for the return of that school money; that is all; and the balance of those conversations were as much sought by Mr. Steel, if not more so, as by me, and especially pertaining to Mr. Steel's transactions with that bank himself, and he was perfectly willing to talk.

Q. You say Mr. Steel was not under oath at any of those interviews?

A. Never.

Q. You had determined, had you not, prior to the 6th day of January, 1908, to file these informations?

A. I had plenty of proof which satisfied my mind beyond any question of doubt that these defendants were guilty; otherwise, I would not have filed it on the 6th.

Q. You had that proof prior to the 6th of January?

A. Yes, sir. In other words I was in possession of the facts which led me to believe these people were guilty and there was nobody trying to deny the fact that this investigation was made during the legal holidays. Every bit of this investigation was made dur-
18 ing the legal holidays, if that is what you are trying to get at; every bit of it.

Q. Your mind was made up*on* before the expiration of the legal holidays?

A. Yes, sir.

Q. That it was your duty to file the Information?

A. Yes, sir, my mind was made up before the 6th of January, that these men were guilty.

Q. And you had determined to file these Informations?

A. Yes, sir, and I will say further from evidence gathered during the legal holidays.

Q. Then on the 6th of January, when this court was in session you called Mr. Black and Mr. Ferguson before you?

A. Yes.

Q. And conducted a pro forma investigation in your office?

A. I never had Mr. Black or Mr. Ferguson before me during the

legal holidays, except to instruct them, or gather from them what information I could as they would gather it from the books of that institution; I never put them under oath until the 6th of January, about ten or eleven o'clock.

Q. And the Informations were filed an hour or two later?

A. About two o'clock, was it not.

Q. They were on file before two o'clock?

A. Well, they were not filed much before twelve, I guess; about twelve o'clock; at any rate they were on file some time before two o'clock on that day.

That the said John Manning also testified that he had interviewed John F. Shields, J. Thorburn Ross, and George H. Hill, but that the said parties, except J. Thorburn Ross, had not been placed under oath."

Also an affidavit of J. Thorburn Ross which was likewise duly sworn to and filed in this court and cause, and which, omitting the formal parts was as follows:

"I, J. Thorburn Ross, being duly sworn depose and say that on the 6th day of January, 1908, with my co-defendants
19 herein I was arraigned in Department No. 3 of this Court on an Information which omitting the formal parts was in words and figures as set forth in Exhibit "A" attached to this affidavit and made a part hereof. That thereafter and on the 3rd day of March, 1908, my demurrer to the said information was sustained by this court that the cause was resubmitted to the District Attorney by order of this court; that I believe and charge the fact to be that the District Attorney has made no new investigation into the facts in this case, but that the filing of the information herein has been based wholly on the investigation made prior to the filing of the information hereto annexed and marked exhibit "A," except that I have been advised that George A. Steel has been called before the District Attorney since the said demurrer was sustained, but that he was not examined on any of the matters material to this cause."

EXHIBIT "A".

"That said Defendants J. Thorburn Ross, George H. Hill, John E. Aitchison and T. T. Burkhart are accused by the District Attorney of the Fourth Judicial District of the State of Oregon in this Information of the crime of larceny committed by converting to their own use money belonging to the State of Oregon in violation of Section 1807 of Bellinger and Cotton's Annotated Codes and Statutes of Oregon.

That on the 9th day of September, A. D. 1907, in the County of Multnomah and State of Oregon, the Title Guarantee & Trust Company was then and there a corporation organized and existing under the laws of the State of Oregon and conducting a banking business in said County and State; that the Defendant J. Thorburn

Ross was then and there the duly elected and acting President and a duly elected and acting director of the said corporation; that the defendant T. T. Burkhart was then and there the duly elected and acting Treasurer and a duly elected and acting director of the said corporation, and the said defendant George H. Hill was then and there the duly elected and acting Vice-president of the said corporation and a duly elected and acting director thereof and the said John E. Aitchison was a duly elected and acting director thereof.

That the said defendants theretofore received ($327,352.10) Three Hundred Twenty-seven Thousand Three Hundred Fifty-two 10/100 Dollars, money belonging to the State of Oregon, for the said State from George A. Steel, who was then and there the duly elected and acting Treasurer of the State of Oregon, and at the time the said money was so received had possession of and was the legal custodian of said money, being lawful money of the United States of America, and bank notes, a more particular description of which is to the District Attorney unknown, and of the value of $327,352.10, and the said defendants then and there had in their possession the said money, which money then and there belonged to the Irreducible School Fund, the agricultural college fund, and to the University Fund, of the said State; and the said defendants then and there having possession of the said money belonging to the said State, as aforesaid did then and there wilfully, unlawfully, feloniously and knowingly convert the same to their own use, the said defendants then and there well knowing that the said money so converted as aforesaid was then and there the property of the State of Oregon and was then and there the Irreducible school fund, the Agricultural College fund and the University fund of the said State, and then and there took, stole and carried away the said money, the property of the State of Oregon, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon.

Dated at the City of Portland, in the County aforesaid this 6th day of January, A. D. 1908."

No affidavits were filed by the District Attorney to controvert the showing made in the foregoing affidavits.

The defendants for the purpose of further showing the facts contended for by them and alleged by them to be material for the proper determination of the said motion called the District Attorney to the witness stand for the purpose of proving what, if any, investigation had been made by the District Attorney into the facts of this case subsequent to the 6th day of January, 1908, and offered to prove that there had been no investigation whatsoever except as shown in the affidavit of the defendant Ross.

That the District Attorney was present in Court, but declined to be sworn as a witness; that the defendants thereupon applied to the Court for an order requiring the District Attorney to take the witness stand and submit to examination on said matters; that the court declined to make such order, and the defendants thereupon excepted to the Court's ruling and the exception was by the Court allowed.

The motions were thereupon submitted to the Court and were denied, the defendants excepting to the ruling of the Court in denying the same, and such exception was by the Court allowed.

This is to certify that the foregoing Bill of Exceptions was prepared and presented within the time allowed therefor, and that the foregoing is a true and correct transcript of all matters which were before the court in connection with the information in the above entitled cause and the motion to quash and dismiss the same.

JOHN B. CLELAND, *Judge.*

Dated March 27th, 1908.

COUNTY OF MULTNOMAH,
State of Oregon, ss:

Due service of the within — is admitted this — day of ——, 19—.

JOHN MANNING,
Attorney for State of Oregon.
By JOHN H. STINSON, *Deputy.*

"Endorsed": C 758. In the Circuit Court of the State of Oregon for Multnomah. State of Oregon, Plaintiff vs. J. Thorburn Ross, et al. Defendants. Bill of Exceptions. Filed March 27th, 1908, F. S. Fields, Clerk, By J. H. Bush, Deputy. Snow & McCamant, Attorneys for Defendant Ross.

22 And afterwards on the 20th day of April this cause comes on for trial in the Circuit Court for Marion County, of which the following is a copy of the proceedings, to-wit:

#9001.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, GEORGE H. HILL, JOHN E. AITCHISON and T. T. BURKHART, Defendants.

This cause came on for hearing in the Circuit Court of the State of Oregon for the County of Multnomah, for a change of venue, wherein the following order was made, to-wit:

In the Circuit Court of the State of Oregon for the County of Multnomah.

#758.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, GEORGE H. HILL, JOHN E. AITCHISON and T. T. BURKHART, Defendants.

This cause having been argued and submitted to the Court on the motion of the Defendant J. Thorburn Ross for an order changing

the place of trial herein, and the Court being now fully advised thereon,

It is considered, ordered and adjudged that the said Motion be and it is hereby allowed, and Marion County is fixed upon and selected as the place for the trial of this cause.

It is considered, ordered and adjudged that this cause be transferred to the Circuit Court of the State of Oregon for Marion County, and that within one week from this date the Clerk do make copies of all papers on file in this cause and that the said copies be retained by him in lieu of the originals and that all original papers on file in this cause and copies of all journal entries entered
23 herein be within one week from this date transmitted by the Clerk of this Court to the Clerk of the Circuit Court of the State of Oregon for Marion County, provided that this order shall not apply to any papers in the record as to which counsel may stipulate to the effect that the same need not be forwarded.

Pursuant to Stipulation it is further ordered that change of venue shall apply to and in behalf of the Defendants John E. Aitchison and T. T. Burkhart.

(Signed) JOHN B. CLELAND,
Presiding Judge.
" C. U. GANTENBEIN, *Judge.*
" EARL C. BRONAUGH, *Judge.*

And now on this day in this court this cause comes on for trial of J. Thorburn Ross who demands a separate trial, Defendant J. Thorburn Ross appearing in his own proper person as well as by Wallace McCamant, and W. M. Kaiser his Attorneys and the State of Oregon appearing by John Manning, John H. McNary, C. L. McNary, Bert Haney, M. L. Pipes, its Attorneys and a jury being called comes now Jacob Staiger, F. D. Knight, Charles R. Riches, H. A. Siegmund, George Brown, Joseph Kirsch, C. F. Hein, J. F. Short, F. L. Kenedy, James Forbis, Otis Meyers, and W. J. Habberly, twelve good and lawful men of Marion County, State of Oregon, who were duly empaneled and sworn and who after hearing the statements of counsel and pending examination of witnesses, were ordered until tomorrow morning at 9 o'clock A. M.

GEO. H. BURNETT, *Judge.*

24

#9001.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, GEORGE H. HILL, JOHN E. AITCHISON and T. T. BURKHART, Defendants.

On this day this cause comes on in continuation of yesterday's trial, State of Oregon appearing by John Manning, Charles L. McNary, Bert Haney, and M. L. Pipes its Attorneys and the Defendant J. Thorburn Ross appearing in his own proper person as well as by

Wallace McCamant and Wm. Kaiser his attorneys, and pending examination of witnesses court adjourned until tomorrow morning at 9 o'clock A. M.

GEO. H. BURNETT, *Judge.*

April 21st, 1908.

#9001.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, GEORGE H. HILL, JOHN E. AITCHISON and T. T. BURKHART, Defendants.

On this day this cause comes on in continuation of the trial of J. Thorburn Ross, State of Oregon appearing by John Manning C. L. McNary, B. E. Haney and M. L. Pipes its Attorneys and the Defendant J. Thorburn Ross appearing in his own proper person as well as by Wallace McCamant and Wm. Kaiser his Attorneys and after hearing the remainder of the testimony in the cause and pending argument of counsel court adjourned until tomorrow morning at 9 o'clock A. M.

GEO. H. BURNETT, *Judge.*

April 22nd, 1908.

And afterwards on the 23rd day of April the Jury returned into Court the following verdict, to-wit:

#9001.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, GEORGE H. HILL, JOHN E. AITCHISON, and T. T. BURKHART, Defendants.

On this day this cause comes on in continuation of yesterday's trial of the Defendant J. Thorburn Ross, said Defendant appearing in his own proper person as well as by Wallace McCamant and Wm. Kaiser his Attorneys and the State of Oregon appearing by John Manning, District Attorney of the Fourth Judicial District of the State of Oregon, and Charles L. McNary, M. L. Pipes and B. E. Haney its Attorneys, and after hearing the remainder of the testimony in the case, and the arguments of the respective counsel, the jury was charged by the Court and placed in charge of proper sworn officers of the Court retired to consider their verdict and after due consideration thereof, returned into Court the following verdict, to-wit:

In the Circuit Court of the State of Oregon for the County of Marion.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, GEORGE H. HILL, JOHN E. AITCHISON, and T. T. BURKHART, Defendants.

We, the jury in the above entitled Criminal Action, find the defendant J. Thorburn Ross, guilty as charged in the Information and we find the amount of money converted as alleged in the Information to be the sum of $288,426.87.

OTIS MYERS, *Foreman.*

Whereupon on motion of Defendant J. Thorburn Ross, by Wallace McCamant his Attorney, to have the jury polled, each juror assented to the verdict, and was discharged from the case and
27 the verdict was ordered filed.

It is therefore ordered and adjudged by the Court that Monday the 27th day of April, A. D. 1908, be and the same is hereby fixed as the time for pronouncing Judgment upon the defendant J. Thorburn Ross.

GEO. H. BURNETT, *Judge.*

28 And afterwards on the 27th day of April, A. D. 1908, the following order was made postponing time for pronouncing judgment, to-wit:

#9001.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, GEORGE H. HILL, JOHN E. AITCHISON, and T. T. BURKHART, Defendants.

On this day this cause comes on to be heard on Defendants motion for continuance of time for pronouncing judgment on the Defendant J. Thorburn Ross, State of Oregon appearing by John Manning District Attorney and the Defendant J. Thorburn Ross appearing in his own proper person as well as by Wallace McCamant and Wm. Kaiser his Attorneys, and after hearing the arguments of counsel and the court being fully advised.

It is ordered that the time for pronouncing judgment on J. Thorburn Ross be and the same is hereby fixed as the 27th day of May, 1908, at 1 o'clock P. M.

GEO. H. BURNETT, *Judge.*

29 And afterwards on the 27th day of May, 1908, Defendant filed his Motion for Arrest of Judgment which reads as follows, to-wit:

In the Circuit Court of the State of Oregon for Marion County.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS et al., Defendants.

Comes now the Defendant J. Thorburn Ross, and moves the Court for an arrest of judgment in this cause, on the ground that the information does not state facts sufficient to constitute a crime.

WM. M. KAISER,
WALLACE McCAMANT,
Attorneys for Defendant J. Thorburn Ross.

COUNTY OF MULTNOMAH,
State of Oregon, ss:

Due service of the within Motion in arrest of Judgment is admitted this — day of May, 1908.

JOHN MANNING,
District Attorney.

"Endorsed": #9001. In the Circuit Court of the State of Oregon for Marion County. State of Oregon, Plaintiff, vs. J. Thorburn Ross, et al., Defendants. Motion for arrest of Judgment. Filed May 27th, 1908, R. D. Allen, Clerk. By Bertha L. Allen, Deputy. Snow & McCamant, Attorneys for Defendant Ross.

30 And afterwards on the same day Defendant Ross files his Motion for a new trial which reads as follows, to-wit:

In the Circuit Court of the State of Oregon for Marion County.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS et al., Defendants.

Comes now the Defendant J. Thorburn Ross, and moves the Court for an order setting aside the verdict herein and granting the defendant a new trial on the following grounds, to-wit:

1. Insufficiency of the evidence to justify the verdict.
2. That the verdict is against law.
3. Error in law occurring at the trial and excepted to by the defendant as follows:

a. The admission of testimony offered by the State and objected to by the defendant which was improper, inadmissible, incompetent irrelevant, immaterial and prejudicial to the Defendant's rights.

b. The rejection of competent, material and relevant evidence properly offered by the defendant and essential to the making of his defense.

c. The refusal of the Court to give instructions to the jury requested by the defendant which were appropriate to the evidence in the cause and sound in law.

d. The giving of instructions to the jury which were misleading and which were incorrect statements of the law as applied to the evidence in this cause.

e. The giving of instructions to the jury for which there was no basis or ground in the evidence.

f. The failure to direct the jury to find the defendant not guilty.

WM. P. LORD,
WM. M. KAISER,
WALLACE McCAMANT,
Att'ys for Def't J. Thorburn Ross.

31 COUNTY OF MULTNOMAH,
State of Oregon, ss:

Due service of the within Motion for new trial is admitted this 27th day of May, 1908.

JOHN MANNING,
District Attorney for Fourth District.

"Endorsed": #9001. In the Circuit Court of the State of Oregon for Marion County, State of Oregon, Plaintiff vs. J. Thorburn Ross et al., defendants. Motion for an order for new trial, Filed May 27th, 1908, R. D. Allen, Clerk, by Bertha L. Allen, Deputy. Snow & McCamant, Attorneys for Defendant Ross.

32 And afterwards on the 28th day of May, 1908, the Court made the following order and sentence, to-wit:

#9001.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, GEORGE H. HILL, JOHN E. AITCHISON, and T. T. BURKHART, Defendants.

On this 28th day of May, 1908, the State of Oregon appears by John Manning District Attorney of the Fourth Judicial District of the State of Oregon, and Martin L. Pipes as counsel, and the Defendant J. Thorburn Ross, appears in his proper person as well as by Wallace McCamant, his Attorney. The court having heretofore heard the argument of counsel upon the Motion of the Defendant J. Thorburn Ross for an arrest of Judgment in this cause and being fully advised, it is now ordered and adjudged by the Court that said Motion in arrest of judgment be and the same is hereby overruled. And the Defendant J. Thorburn Ross being then and there personally present in Court, is asked if he has anything further to say why sentence and judgment should not be pronounced upon him and by his said attorney answers that he has not.

It is therefore ordered and adjudged by the court that the Defendant J. Thorburn Ross, be imprisoned in the Oregon State Penitentiary for the term of five years; that he be and is hereby fined in the sum of Five Hundred and Seventy-six thousand Eight Hundred fifty-three & 74/100 Dollars; that he be imprisoned in the County Jail of Multnomah County, Oregon, until said fine is paid not exceeding 288426 days and that the State of Oregon have and recover of and from the defendant J. Thorburn Ross the costs and disbursements of this action taxed at $—.

And thereupon then and there this cause comes on further for hearing upon the motion of the Defendant J. Thorburn Ross for an order setting aside the verdict herein and granting to said defendant J. Thorburn Ross a new trial herein, and the Court having heard the arguments of counsel for both parties and being now fully advised it is ordered and adjudged by the Court that said Motion to set aside the verdict and to grant a new trial be and the same is hereby overruled, and said defendant J. Thorburn Ross is admitted to bail pending appeal herein in the sum of Six Thousand Dollars. Upon consent of parties by their respective attorneys in open court it is ordered by the Court that the time in which the Defendant J. Thorburn Ross may file in the Supreme Court of the State of Oregon a transcript on appeal herein be and the same is hereby extended to and including the fifteenth day of July, 1908.

33

GEO. H. BURNETT, *Judge.*

And afterwards on the 28th day of May, a certificate of probable cause was filed which reads as follows, to-wit:

34

In the Circuit Court of the State of Oregon for Marion County.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, GEORGE H. HILL, JOHN E. AITCHISON, and T. T. BURKHART, Defendants.

The Defendant J. Thorburn Ross, having appealed to the Supreme Court of the State of Oregon from a Judgment pronounced and entered against him this 28th day of May, 1908, I do hereby certify that in my opinion there is probable cause for the said appeal.

Dated May 28th, 1908.

GEO. H. BURNETT,
Circuit Judge.

"Endorsed": #9001. In the Circuit Court of the State of Oregon for Marion County. State of Oregon vs. J. Thorburn Ross, et al. Certificate of Probable cause. Filed May 28th, 1908, R. D. Allen, Co. Clerk, By Bertha L. Allen, Deputy.

35 And afterwards on the 28th day of May, 1908, the Defendant J. Thorburn Ross filed his Notice of Appeal which reads as follows:

In the Circuit Court of the State of Oregon for Marion County.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, JOHN E. AITCHISON, GEORGE H. HILL, and T. T. BURKHART, Defendants.

To R. D. Allen, Clerk of the above entitled Court; John H. McNary, District Attorney for the Third Judicial District, including the County of Marion, and John Manning, District Attorney for the Fourth Judicial District, including the County of Multnomah:

You and each of you, will take notice that the defendant J. Thorburn Ross, hereby takes his appeal to the Supreme Court of the State of Oregon, from a judgment made and entered against him in the above entitled court and cause on the 28th day of May, 1908, wherein and whereby the defendant aforesaid was sentenced to imprisonment in the Oregon Penitentiary for a term of five years and to pay a fine in the sum of $576,853.74/100 and the costs of prosecution.

WM. P. LORD,
WM. M. KAISER,
WALLACE McCAMANT,
Attorneys for Defendant J. Thorburn Ross.

COUNTY OF MULTNOMAH,
State of Oregon, ss:

Due service of the within Notice of Appeal is admitted this 28th day of May, 1908.

R. D. ALLEN, *Co. Clerk.*
JOHN MANNING,
36 *Dist. Att'y 4 Judicial District.*
JOHN H. McNARY,
Dist. Att'y 3rd Jud. Dist.

"Endorsed". #9001. In the Circuit Court of the State of Oregon for Marion County. State of Oregon, Plaintiff, vs. J. Thorburn Ross, et al., defendants, Notice of Appeal, Filed May 28th, 1908, R. D. Allen, Clerk, By Bertha L. Allen, Deputy. Snow & McCamant, Attorneys for Defendant Ross.

37 And afterwards on the 28th day of May, 1908, the Defendant filed his Undertaking on appeal which reads as follows, to-wit:

In the Circuit Court of the State of Oregon for Marion County.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, JOHN E. AITCHISON, GEORGE H. HILL, and T. T. BURKHART, Defendants.

A judgment having been given on the 28th day of May, 1908, whereby J. Thorburn Ross was condemned to serve a term in the Oregon Penitentiary of five years and to pay a fine in the sum of $576,853.74/100 and he having appealed from said judgment and been duly admitted to bail in the sum of $6000.00; we, A. A. Lindsley, of Portland, Multnomah County, Oregon, and by occupation a lumberman, and John T. Ross, of Astoria, Clatsop County, Oregon, and by occupation a grocer, hereby undertake that the above named J. Thorburn Ross shall in all respects abide and perform the orders and judgments of the Appellate Court on the Appeal, or if he fail to do so in any particular that we will pay to the State of Oregon the sum of $6000.00.

A. A. LINDSLEY.
JOHN T. ROSS.

STATE OF OREGON,
County of Marion, ss:

I, A. A. Lindsley, and I, John T. Ross, being duly and severally sworn, do depose and say each for himself I am a resident and freeholder within the State of Oregon and not a counsellor or attorney, sheriff, clerk of any court or other officer of any court, and am worth the sum of $6000.00 over and above all my just debts and liabilities and exclusive of property exempt from execution.

A. A. LINDSLEY.
JOHN T. ROSS.

38 Subscribed and sworn to before — this 28th day of May, 1908.

GEO. H. BURNETT,
Circuit Judge.

Endorsed: In the Circuit Court of the State of Oregon for Marion County, State of Oregon, Plaintiff vs. J. Thorburn Ross, et al., defendants. Undertaking for Bail. Filed May 28th, 1908, R. D. Allen, Clerk, By Bertha L. Allen, Deputy. Snow & McCamant, Attorneys for Defendant Ross.

39 And afterwards on the 19th day of June the following bill of exceptions was filed in the above entitled cause, to-wit:

In the Circuit Court of the State of Oregon for Marion County.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, GEORGE H. HILL, JOHN E. AITCHISON and T. T. BURKHART, Defendants.

Be it remembered that on the 20th day of April, 1908, the Defendant J. Thorburn Ross was tried in the above entitled court and cause, he having demanded a separate trial of the charge preferred against him therein, said trial being had before the Honorable Geo. H. Burnett, Judge of the said Court, and a Jury regularly impaneled. The State appeared by John Manning, District Attorney for the Fourth Judicial District, M. L. Pipes, Bert E. Haney and Charles McNary. The Defendant appeared by William Kaiser and Wallace McCamant. Thereupon the State, to maintain the issues, on its behalf offered evidence to show that the Title Guarantee and Trust Company was a corporation organized and subsisting under the laws of the State of Oregon, and that its place of business was in Multnomah County, Oregon; that on the 28th day of October, 1907, and for one year prior thereto the Defendant J. Thorburn Ross had been its President; that from July, 1906 to July 1907, its Board of Directors had consisted of J. Thorburn Ross, T. T. Burkhart, George H. Hill, Frank M. Warren and William M. Ladd; that at all times subsequent to the month of July, 1907, its Board of Directors had consisted of J. Thorburn Ross, T. T. Burkhart, Geo. H. Hill, Frank M. Warren and John E. Aitchison; that since the year 1904 the Title Guarantee and Trust Company had been engaged in the Banking business, but not exclusively in such business; that it had also prepared abstracts of title, written title insurance, made mortgage loans, receiving compensation for such services as a broker; that it had sold real estate on commission and performed other services for compensation; that on the 6th day of November, 1907, a bill of complaint was filed in the Circuit Court of the United States for the District of Oregon by N. Coy against the Title Guarantee and Trust Company and its Board of Directors; that upon consideration of the said bill of complaint on the 6th day of November, 1907, an order was entered in the said Court appointing George H. Hill Receiver of the Title Guarantee and Trust Company, directing him to take immediate possession of all its properties, assets and effects, and directing the defendants to turn over and deliver to him all of the same and also all property, books, vouchers, papers and documents of all kinds in their possession belonging to the Title Guarantee and Trust Company; that thereafter and pursuant to the requirements of the said order the said George H. Hill furnished a bond in the sum of $100,000.00 which was approved by the said Court, and took the oath prescribed by the said order and thereupon became qualified and entered upon the discharge of his duties as such Receiver; that afterwards and on the 20th day of January, 1908, a petition was

filed in the said court and cause by William M. Ladd, wherein he set forth that he had guaranteed and did guarantee the payment of all of the debts of the Title Guarantee and Trust Company, and wherein he set forth copies in writing of such guaranty, and wherein he petitioned that R. S. Howard, Jr., might be named as Receiver of the said corporation; that thereupon and on the 21st day of January, 1908, the said R. S. Howard, Jr., was duly appointed Receiver of the Title Guarantee and Trust Company; that he qualified immediately by furnishing bond in the sum of $200,00-.00 and by taking an oath of office as required by the order of Court, and that he thereupon succeeded to the duties of Receiver of the said corporation and to the care and custody of its properties, books, records and documents.

That the State thereupon offered evidence on the subject of the possession of the fund referred to in the information herein, and all of the testimony on the said subject was as follows: That on the 14th day of January, 1907, George A. Steel took office as Treasurer of the State of Oregon; that at that time there was $481,633.90 in the treasury of the State; that upwards of $400,000.00 of this sum was on deposit subject to check in banks within the State; that
41 $35,000.00 of this sum was on deposit in the bank of the Title Guarantee & Trust Company subject to the check of the State Treasurer; that there was no segregation of the funds in the State Treasury as between the Educational Funds and the General Funds except on the books of the State Treasurer; that since January 9, 1899, the bulk of the funds in the Treasury of the State had been deposited in banks in the State subject to check, the said deposits being demand deposits, and the State Treasury being in each case treated like any other general depositor in the bank; that the banks had not been notified as to whether the funds in their possession belonged to the general fund in the custody of the State Treasurer or to the Educational Fund, and that in fact there had been no segregation of those funds except that the books of the State Treasurer at all times showed what moneys were to the credit of each fund of which the State Treasurer was the custodian.

That after George A. Steel took charge of the office as State Treasurer he continued the said account with the Title Guarantee and Trust Company, the said account being in the name of George A. Steel, State Treasurer, and thereafter deposits were made in the same and checks drawn against the same from time to time; that on the 3rd day of June, 1907, the following letter was written by the Chief Clerk in the office of the State Treasurer and transmitted with inclosures as therein stated through the mail:

State of Oregon.
Treasury Department,
Salem.

June 3, 1907.

The Title Guarantee and Trust Company, Portland, Oregon.

Gentlemen: I enclose herewith for credit of Geo. A. Steel, State Treasurer, "Educational," the following checks:

No. 319 Geo. A. Steel, State Treasurer, on you..... $272,449.02
No. 34 Geo. A. Steel, State Treasurer, on Ladd &
42 Tilton ..... $ 2,600.00

$275,049.02

Yours very truly,

GEO. A. STEEL,
State Treasurer.

The evidence tended to show that the said letter reached the Title Guarantee and Trust Company on the 4th day of June, 1907, and that on the 5th day of June, 1907, an account was opened on the books of the Title Guarantee and Trust Company entitled, "Geo. A. Steel, State Treasurer, Educational;" that the said account in its first item was credited with a deposit of $275,049.02; that thereafter and between the date of the opening of the said account and the appointment of a Receiver on the 6th of November, 1907, as above stated, 108 letters were written by the State Treasurer transmitting checks for deposit in the said account; that the first of the said subsequent letters was as follows:

State of Oregon,
Treasury Department,
Salem.

JUNE 4, 1907.

The Title Guarantee and Trust Company, Portland, Oregon.

GENTLEMEN: I enclose herewith for credit of Geo. A. Steel, State Treasurer, "Educational", the following check:

No. 164 his check on Ladd and Bush, Bankers, Salem..$842.72

Yours very truly,

GEO. A. STEEL,
State Treasurer.

That all of the other letters were in substantially the same form; that in each case credit was given on the books of the Title Guarantee and Trust Company for the checks so forwarded for deposit in the said account; that large numbers of checks were
42 drawn on the said account during the said period of time, and the balance to the credit of the said account fluctuated from day to day; that many of the letters transmitting checks for deposit to the credit of the said account transmitted more than one check; that on the 30th day of September the State Treasurer transmitted to The Title Guarantee and Trust Company 102 checks for the aggregate sum of $37,467.64, which sum was credited as a deposit in the said account on the 2nd day of October, 1907; that of the said checks so transmitted there were checks drawn on forty-four banks within the State of Oregon, on four banks in San Francisco, on one bank in Seattle, on three banks in New York, on two banks in Chicago, on one in Caldwell, Idaho and one in Wilson Creek, Washington. There was no evidence to show that there was

in fact any segregation of money, checks, drafts or evidences of indebtedness representing the deposit of the said Educational Funds or any agreement or understanding that there should be such segregation except as aforesaid. That on the day when the Receiver took possession of the properties of the Title Guarantee and Trust Company the balance to the credit of the Educational Fund aforesaid was $288,426.87. Except as aforesaid there was no evidence on the subject of the possession of the moneys referred to in the information. The evidence of the State showed without contradiction that all deposits which were made to the credit of the said account, "Geo. A. Steel, State Treasurer, Educational", were made in the form of checks, and except as aforesaid and as in this bill of exceptions specifically stated there was no evidence that any of the said checks had been collected or had been converted into cash by the Title Guarantee and Trust Company or by any one. The evidence showed that The Title Guarantee and Trust Company was not a member of the Portland Clearing House but that it cleared through Ladd and Tilton who were private bankers in Portland. There was evidence to the effect that the Title Guarantee and Trust Company had been designated by the State Treasurer as the active depositary of the State when the act of 1907 providing for such active depositary went into effect. There was evidence as stated on page 8
44 of this bill of exceptions of a demand and acknowledgement thereof by the Title Guarantee and Trust Company by J. Thorburn Ross, President, and George H. Hill, Receiver, of date November 12th, 1907. Except as aforesaid there was no evidence tending to show a bailment with the Title Guarantee and Trust Company or with the defendants of any money, bank notes, checks, drafts or evidences of debt. There was evidence tending to show that in addition to the aforesaid account to the credit of "George A. Steel, State Treasurer, Educational", there was another account to the credit of "George A. Steel, State Treasurer," in which deposits were made and against which checks were drawn in the same way and that the balance in the said account fluctuated from day to day.

The evidence on the subject of the conversion was as follows: Evidence was offered showing the balance due on each day from the 5th of June to the 6th of November, 1907, in the aforesaid account, "George A. Steel, State Treasurer, Educational". That the evidence likewise showed the cash on hand of the Title Guarantee and Trust Company in its banking department on each day during the said period of time; that said evidence was the cash books of the banking department of the Title Guarantee and Trust Company; that the evidence showed that down to and including the 20th day of August, 1907, the cash on hand of the Title Guarantee and Trust Company always exceeded the balance due from it on the said account "George A. Steel, State Treasurer, Educational". There was evidence to show that on the 21st of August, 1907, the cash on hand of the Title Guarantee and Trust Company was $337,011.67 and that the balance due on the account aforesaid was $337,308.06, and that therefore the cash on hand was short by $296.19 of being

enough to pay the balance to the credit of said account, "George A. Steel, State Treasurer, Educational". That thereafter on each subsequent day down to and including the 6th day of November, 1907, the cash of the Title Guarantee and Trust Company was less than the balance due on the said account; that the difference be-
45 tween the balance aforesaid and the cash on hand of the Title Guarantee and Trust Company varied from day to day, but that the same amounted to $274,882.73 on the 6th of November, 1907; that on no other day was the difference aforesaid so large as on the 6th of November, 1907. There was evidence tending to show that in addition to the cash on hand in the banking department as aforesaid there was also some cash always on hand in the general department of the business of the Title Guarantee and Trust Company. The evidence did not show what this cash amounted to on any day, but tended to show that it was only a small sum of money at the time above referred to. The Defendant J. Thorburn Ross, being called as a witness on his own behalf, testified in part as follows:

"State to this jury whether or not you ever at any time converted to your own use any money whatever belonging to the Educational Fund of the State of Oregon, or any educational fund of the State of Oregon?

A. Not one dollar.

On cross-examination he was asked:

Q. How much money did you get from the State of Oregon as deposited by the State Treasurer with the Title Guarantee and Trust Company?

A. I never received any money from the State of Oregon."

After the record showed the fact that a Receiver appointed by the United States Circuit Court for the District of Oregon had taken possession of the assets and properties of the Title Guarantee and Trust Company on the 6th of November, 1907, evidence was offered by the State to show that on the 12th of November, 1907, George A. Steel, the State Treasurer of Oregon, had made a written demand on the Title Guarantee and Trust Company in words and figures as follows, to-wit:

"9001.
G. H. B.

To Title Guarantee & Trust Company, a corporation, and G. H. Hill, Receiver.

I, Geo. A. Steel, as State Treasurer of the State of Oregon, on my own behalf as such State Treasurer, and on behalf of the State of Oregon, hereby demand immediate payment to me as such State Treasurer for the State of Oregon and for its use and benefit the sum of $395,951.24, money due me as such State Treasurer from said Title Guarantee & Trust Company and belonging to the State of Oregon, to-wit:

Active fund	$47,483.81
With interest thereon to November 6, 1907	40.56
Also six demand certificates of deposit, each dated March March 15, 1907, of $10,000.00 each	60,000.00
Also the sum of (known as the educational fund)	288,426.87

Dated at Portland, Oregon, November 12, 1907.

GEO. A. STEEL,
State Treasurer of State of Oregon."

And that the Defendants George H. Hill, and J. Thorburn Ross had accepted service of the said paper in writing as follows, to-wit:

"STATE OF OREGON,
County of Multnomah, ss:

I hereby acknowledge demand of Geo. A. Steel, as State Treasurer of Oregon, for immediate payment of the sums of money above mentioned, and receipt of written demand for the same of which the above is a copy, in Multnomah County, Oregon, this 12th day of November, A. D. 1907, together with offer to surrender all State certificates of deposit mentioned in said demand on payment of the money due on the same, which demand for payment is refused for want of funds.

TITLE GUARANTEE & TRUST COMPANY,
By J. THORBURN ROSS, *President.*
By GEORGE H. HILL, *Receiver.*"

The defendant objected to the testimony aforesaid when offered on the ground that the demand was made on the Title Guarantee and Trust Company and not on this defnedant; on the fur-
47 ther ground that it tended to prove a different crime from that alleged in the Information, and on the ground that the assets and proprerties of the Title Guarantee and Trust Company at the date of the demand had passed out of the posession of the said corporation and were held by a Receiver of the United States Circuit Court for the District of Oregon. The said objections were overruled by the Court and an exception was granted to the Defendant to the ruling so made; that thereupon the said written demand and the acceptance of the same were proved and admitted in evidence; that the foregoing is a full and complete statement of all of the evidence offered and received on the subject of conversion, and that except as aforesaid there was no evidence offered on the trial of the said cause to show the conversion of the moneys described and referred to in the Information; that at the conclusion of the testimony of the State, the Defendant moved to strike out all of the testimony of the State on the ground that there had been a failure of proof on the subject of conversion. This motion was denied by the Court and an exception was allowed to the defendant to the aforesaid ruling.

The evidence on the subject of the knowledge of the defendant and the responsibility of the defendant in connection with the acts

and omissions of the Title Guarantee and Trust Company was as follows: There was evidence offered and received as aforesaid to show the official connection of the defendant Ross with the Title Guarantee and Trust Company, and that the same was as above set forth.

GEORGE A. STEEL, a witness for the State, testified as follows:

Q. State whether or not as State Treasurer you had dealings or business with the Title Guarantee and Trust Company, or with either or all of these defendants, in January, 1907, after you became State Treasurer.

A. No one except the Title Guarantee and Trust Company. I had no business with the others.

Q. What was the nature of that business?

48 A. I deposited State funds there.

Q. Did you have any correspondence with Mr. Ross with respect to the deposit?

A. I don't think any further than with the bank; I don't remember corresponding with him about it; there might have been a personal correspondence with him, but I don't think so. The business affairs and transactions were principally done by my chief clerk.

Q. Did you have any talk with Mr. Ross about depositing these funds?

A. Nothing special that I know of about the school fund. Probably when the law took effect I may have talked with him about it, but I don't remember. The account was segregated.

Q. Did you have any correspondence with Mr. Ross or with the bank about that?

A. Nothing, only instructions.

Q. Personal instructions?

A. By letter from the office.

Q. Did you have any arrangement or agreement with Mr. Burkhart or Mr. Ross, or Mr. Aitchison or Mr. Hill about the manner and arrangement by which these funds would be deposited in the bank?

A. I did. I don't think that Mr. Ross knew at the time any further than my instruction in the office; I probably spoke to him but I don't remember any conversation.

Q. With whom did you deal?

A. Whatever dealing personally would be with Ross or Burkhart.

Q. With whom did you communicate about the deposit?

A. Direct with the bank I think; that is to say a letter was written by Mr. Perkins, the Deputy.

Q. Do you mean to say that you addressed a letter to the Title Guarantee & Trust Company?

A. Yes, I sent a check on this account to take it out of the one account and put it in the other.

49 Q. You don't think you had any conversation with these defendants in January or thereafter?

A. This would be in June, about the first of June that this account was opened.

Q. Did you have any conversation with these defendants about this deposit?

A. I had no detailed understanding and I certainly would not. Probably not incidental talk, but the Educational Account was opened there about the 13th of June and taken out of the other general account and then I kept these two funds, the Educational fund separate from the General Fund.

Q. You mean to be understood as saying that you immediately placed these deposits with the Title Guarantee & Trust Company without having any communication personally, or any writing with the defendant?

A. I don't know that I had any such conversation. It is only fair to presume that I did tell him about it but I don't remember about it or any details about it. I remember the account must have been transferred by my orders from the office.

Q. I am now talking about the original arrangement by which you began making deposit with the bank.

A. There was no special arrangement with them any more than with any other bank.

Q. Was there with any other bank?

A. No sir, no arrangement with them specially.

Q. You simply sent the money down there without saying a word about it?

A. The money was in the bank and I continued those accounts just as they were when I took charge of the office.

Q. Do you mean to say that you sent them money and never said anything about it?

A. There was no question about the amount as I don't know of any special instructions about it only to continue the account with the State, but those things I don't remember.

50 Q. Did you in any communication with the defendant in this case, verbally or in writing notify them of the character of the fund, whether Educational or otherwise?

A. When I first opened the office?

Q. At any time?

A. No. If there was anything of that kind done it must have been when the new law took effect, and I don't remember anything but my record will show, but I don't remember that.

The evidence of the State showed that the Title Guarantee and Trust Company had seventy or eighty employés. All of the testimony with reference to the dealings of the State Treasurer with the Title Guarantee and Trust Company was admitted subject to the objection of the Defendant and on the condition imposed by the Court that the State must connect the defendant with these transactions. At the conclusion of the State's testimony the defendant moved to strike out all of the testimony introduced by the State on the ground that there had been no showing that the defendant on trial had participated in, was responsible for, or had knowledge of the said dealings with reference to the Educational funds of the State. The motion of the defendant was denied by the Court and the defendant was allowed an exception to the ruling of the Court in denying the same.

The defendant likewise objected to all testimony of dealings be-

tween the State Treasurer and the Title Guarantee and Trust Company on the ground that the said testimony was incompetent, irrelevant and immaterial and that the same did not go to the determination of any of the issues involved in this case, and that it tended to show that the possession of the money or fund referred to in the information was not in the defendants but in some one else not a party to this litigation. The objection of the defendant to this testimony on this ground was overruled; the testimony was admitted, and the defendant was allowed an exception to the ruling of the Court.

51 The defendant likewise objected to the admissibility of all testimony tending to show a deposit of funds with the Title Guarantee and Trust Company by the State Treasurer on the ground that the charge in the Information was a bailment of money and that this charge could not be proved by evidence of a general deposit subject to check. This objection of the defendant to the aforesaid testimony was overruled; the testimony was admitted, and the defendant was allowed an exception to the ruling of the Court in so admitting same.

The defendant moved at the conclusion of the testimony of the State to strike out the evidence of the State on the ground that the charge was conversion by the defendant of lawful money and bank notes, and that the testimony was confined to checks, drafts and coupons, and that there was no evidence to show that any money or bank notes ever came into the possession of the Title Guarantee and Trust Company or of the defendants, or that any money or bank notes were converted by the defendant on trial. This motion was denied by the Court and the defendant was given an exception to the ruling of the Court in denying the same.

While GEORGE A. STEEL, a witness for the State, was on the stand he testified as follows:

Q. Were you there a few days from the time the bank closed?
A. I may have been, yes sir.
Q. Did you talk to Ross in the bank?
A. I don't remember whether I talked with him at that time or not.
Q. Did you make a demand for any money?
A. No sir.
Q. You say the demand you made on him was for security?
A. I don't think that provided for money.
Q. Did you only ask for security?
A. That is all I know.
Q. Did you ask for money or security?
A. For security.
Q. Why did you want security if you could not get the money?
A. I think I wanted to get the security by collateral, if possible.

At this point in the testimony the court said to counsel for the State: "I don't think you are entitled to cross examine your own witness." Counsel for the State thereupon said: "I must invoke the

rule in this case that the witness is an unwilling one." Thereupon the Court said: "I see that the witness is unwilling." Thereupon counsel for the State continued his examination of the witness.

The foregoing conversation took place in the presence of the jury and while the testimony of the State was being received. The defendant thereupon asked for and was allowed an exception to the statement of counsel for the State and the statement of the court.

While GEORGE A. STEEL, a witness for the State, was on the stand he was asked by counsel for the State the following questions:

Q. Did you consult Mr. Ross about the bill pending before the Legislature which was finally passed in the Spring of 1907?
A. Very likely I did, I consulted plenty of bankers about it.
Q. Did you with him?
A. I can't remember exactly but I think very likely I did.
Q. Did you have any correspondence with him?
A. It may be that I wrote him about it, but I don't remember about it.
Q. Did you talk with him after February 13th about the matter?
A. I must have talked with him but I cannot remember the instance.
Q. Did you visit him prior to February 13th in Portland?
A. Very likely. I called in there frequently.
Q. In the month of February?
A. I must have been there in the month of February of course.
Q. In the visits to the bank did you talk with him about the pending bill before the legislature?
A. No doubt. However, I don't remember what talks they were.
Q. Did you send him copies of the bill?
A. Yes, I think so.
Q. Did you go down afterwards and talk to him about those bills?
A. I don't remember whether I did or not, I probably talked with him about it.

The foregoing testimony related to the bill which was passed by the legislature in 1907 regulating the deposit of State funds. All of the foregoing testimony was objected to by the defendant as irrelevant and immaterial. The objection of the defendant was overruled and the testimony aforesaid was admitted, the defendant being allowed an exception to the ruling of the court admitting same.

The defendant, to sustain the issues on his behalf, offered to show by the sworn testimony of Edward Hirsch, A. N. Bush, W. H. Odell, John Sutherland and William T. Perkins that it had been the custom for thirty years prior to the first of June, 1907, for the State Treasurer of Oregon, to deposit all public funds, including the three educational funds involved in this proceeding, in banks in the form of general deposits subject to check; that the custom had been, furthermore, to segregate the funds in the custody of the Treasurer only on the books of the department, the banks in no case being advised of the nature of the funds deposited with them that this cus-

tom had been observed by the Clerk of the State Land Board as well as by the State Treasurer. The testimony so offered was objected to by the State as incompetent, irrelevant and immaterial, and on the ground that the custom of former Treasurers could not be considered by this Court in trying the charge preferred against the defendant on trial. The objection was sustained by the Court, the testimony was excluded and an exception was allowed the defendant.

The defendant also, for the purpose of sustaining the issues on its behalf, called T. T. Burkhart as a witness. After the
54 said witness had been duly sworn he testified that in the year 1907 he was Treasurer of the Title Guarantee and Trust Company. He was then asked, "Do you remember the circumstances of the failure of the Oregon Trust and Savings Bank?" He answered "I do." The witness was then asked by counsel for the defendant, "State what if any effect the closing of the Oregon Trust and Savings Bank had on the business of the Title Guarantee and Trust Company, particularly the banking business. I have reference to the withdrawal of deposits." The State objected to this question as immaterial and irrelevant and on the ground that the testimony had no connection with the case. The objection was sustained by the Court and the defendant thereupon offered to prove by the witness that the Oregon Trust and Savings Bank, a banking institution doing business in Portland, Oregon, had failed about the middle of August, 1907, and that its failure resulted in a run on the Title Guarantee and Trust Company and the withdrawal of deposits from the latter institution aggregating about $500,000.00. This testimony was objected to on the grounds above stated, was excluded by the Court and the defendant was granted an exception to the said ruling.

The testimony showed without objection that at the beginning of the bank holidays on or about the 29th day of October, 1907, the State Treasurer called on the Title Guarantee and Trust Company and asked the defendant Ross to give security for the State funds on deposit with the Title Guarantee and Trust Company. Thereupon the defendant duly proved and offered in evidence and showed that the State Treasurer had received and accepted the following paper:

Know all men by these presents, whereas George A. Steel, Treasurer of the State of Oregon and ex-officio custodian of the several funds of the State of Oregon, has on deposit with the Title Guarantee & Trust Company the sum of about Three Hundred Ninety-five Thousand Dollars ($395,000.00); and

Whereas, the said George A. Steel has made demand on the Title Guarantee & Trust Company for security on the same;

Now therefore, in consideration of the premises and of forbearance on the part of George A. Steel to take legal proceedings for the enforcement of the said claims, and in consideration of the further sum of One Dollar ($1.00) to the Title Guarantee & Trust Company paid, receipt whereof is hereby acknowledged, the Title Guarantee & Trust Company does hereby assign, transfer and set over to George A. Steel, Treasurer of the State of Oregon, and

of the several funds of the State of Oregon, the following described bills receivable and promissory notes, to-wit:

Three (3) demand notes of M. B. Rankin, for Two Hundred Thousand Dollars ($200,000.00) Seventy Five Thousand ($75,000.00) and One Hundred, Ninety-seven Thousand, Six Hundred Seventy-one Dollars and Ninety-four cents ($197,671.94) respectively; all dated July 1, 1907, and all executed to the Title Guarantee & Trust Company, together with the collateral accompanying the same as follows; to-wit:

Four (4) notes of the Texas Oregon Timber Company, bearing date December 24, 1906, on which there was due on the 11th day of September, 1907, the aggregate sum of Four Hundred Twenty-eight Thousand, Five Hundred Seventy-eight Dollars ($428,578.00). Which notes are secured by mortgage on real property situate in Clackamas and Marion Counties, Oregon, said real estate being more particularly described by the said mortgage, which mortgage is hereby assigned, together with the notes aforesaid.

Also note of M. B. Rankin, of date October 5, 1907, for Ten Thousand, Five Hundred Dollars ($10,500.00) payable on demand.

Note of Central Lumber Company endorsed and guaranteed by M. B. Rankin, bearing date March 27, 1907, and being for Thirty Thousand Dollars ($30,000.00).

Note to M. B. Rankin, for Twenty-five Thousand Dollars ($25,000.00) of date July 11, 1907, due three months after date.

Note of John H. Woodward and M. B. Rankin, executed jointly and severally on the 3rd of November, 1905, due ninety days after date, being a note for Five Hundred Dollars ($500.00).

Note of O. M. Rankin and Marie J. Rankin, dated January 9, 1907, for Forty-one Hundred Dollars ($4100.00) due four
56 months after date; together with the note of M. B. Rankin, given as collateral therefor, which collateral note bears date January 2, 1907, due ninety days after date, and is for the sum of Eighty-four Hundred Dollars ($8400.00) and is drawn in favor of O. M. Rankin and endorsed in blank by O. M. Rankin to the Title Guarantee and Trust Company as collateral security for said note of $4100.00 above referred to.

Note of James P. Hagadone of date October 8, 1907, for Fifty-three Hundred Four Dollars ($5304.00) due sixty days after date.

Note of James P. Hagadone, of date September 30, 1907, for Three Hundred Dollars ($300.00), due ninety days after date. Together with note of M. B. Rankin in favor of James P. Hagadone for Eighty-three Hundred Seventy-four Dollars ($8374.00) of date March 7, 1907, and due six months after date. Said last named note being endorsed by James P. Hagadone to the Title Guarantee & Trust Company as collateral security for the two notes last above mentioned.

Note of Charles Crogster, dated August 2, 1907, for Ten Thousand, Seven Hundred Dollars ($10,700.00) due ninety days after date. Together with two notes of M. B. Rankin, both dated August 2, 1907, due ninety days after date; one thereof for Ten Thousand, Seven Hundred Dollars, ($10,700.00), and one thereof for Ten

Thousand Dollars ($10,000.00), held as collateral security for the aforesaid note of Charles Crogster.

Four (4) notes of L. R. Ferbrache; one thereof for Twelve Thousand Dollars ($12,000.00) dated June 18, 1907, secured by One Hundred and Eighty (180) shares of stock of the Oregon-Idaho Company, as evidenced by Certificate No. 4; said stock being of the par value of One Hundred Dollars ($100.00) per share. One for the sum of Three Thousand Dollars ($3,000.00) dated June 22, 1907. One for the sum of Eight Thousand Dollars ($8,000.00) of date July 13, 1907. One for the sum of Twenty-five Thousand Dollars ($25,000.00) of date July 27, 1907, which latter note is executed jointly and severally by the above L. R. Ferbrache and Melvina Ferbrache.

57 Together with any and all security and collateral now held or which may hereafter be acquired for the security of any or all of the aforesaid notes.

To have and to hold unto the said George A. Steel, Treasurer of the State of Oregon and of the several funds belonging to the State of Oregon, and to his successors and assigns forever.

Subject, however, to a pledge already made of the first three notes above described, together with the mortgage security given by the Texas Oregon Company as collateral for the same; said pledge also covering the four notes last above mentioned.

And the Title Guarantee & Trust Company does hereby authorize the said George A. Steel, Treasurer of the State of Oregon, as aforesaid, and his successors and assigns, to sell the same, or any part thereof, after demanding payment thereof, with the right of said George A. Steel to become a purchaser of the same and to apply on the deposit indebtedness aforesaid so much of the proceeds of the said sale as may be necessary to pay the same, together with the expenses attending the sale of said collateral security, including reasonable attorney's fees. And the Title Guarantee & Trust Company does hereby waive and release the said George A. Steel from all duty and diligence to sell, enforce or collect the said collateral.

But the Title Guarantee & Trust Company does hereby authorize the said George A. Steel to do anything useful or convenient to be done in realizing upon the said collateral security and collecting the amount thereof, and particularly to bring suit in the name of the Title Guarantee & Trust Company, or in his own name, for the enforcement of any or all of the above named claims.

In testimony whereof The Title Guarantee & Trust Company has caused its name to be hereto signed and its seal to be hereto affixed by its President and Treasurer, they being thereto duly authorized by its Board of Directors, this second day of November, 1907.

[SEAL.] THE TITLE GUARANTEE & TRUST COMPANY,
By J. THORBURN ROSS, *President.*
THE TITLE GUARANTEE & TRUST COMPANY,
By T. T. BURKHART, *Treasurer.*

58 This paper was objected to on the ground that it was incompetent, irrelevant, immaterial and particularly because it was not within the power of the State Treasurer to take security for the money referred to or to extend the time of payment, and on the ground that it afforded no justification to the defendant for keeping the money. The objection was sustained by the Court, the testimony was excluded and the defendant was given an exception to the ruling of the Court.

The defendant offered in evidence the following paper:

This agreement made and entered into at Portland, Oregon, this seventh day of December, A. D. Nineteen Hundred and seven, by and between the American Surety Company of New York, a private corporation, incorporated and organized under the laws of the State of New York, and having its principal office and place of business in the City of New York, party of the first part, and the State of Oregon by George E. Chamberlain, Governor and A. M. Crawford, Attorney General, and by George E. Chamberlain, Governor, F. W. Benson, Secretary of State, and George A. Steel, Treasurer, as the State Land Board of said State, party of the second part, witnesseth:

That whereas, said George A. Steel was duly elected State Treasurer of the State of Oregon at the general election held in said State on the sixth day of June, A. D. 1906, and on the 11th day of July, A. D. 1906, duly qualified for said office and on the 10th day of July A. D. 1906, duly executed his official bond in the sum of Fifty Thousand (50,000) Dollars, with J. Thorburn Ross, Louis G. Clarke, J. H. Peterson, J. W. Cook, M. B. Rankin, and Wallace McCamant, as sureties, to the State of Oregon, conditioned as by law, and on the 8th day of December, A. D. 1906, duly executed his further official bond in the sum of two hundred and fifty thousand ($250,000) Dollars with the party of the first part as surety to the State of Oregon, conditioned as required by law, and on the 21st day of September, A. D. 1907, upon the demand of the Governor of said State duly executed his additional official bond in the sum of three hun-

59 dred thousand ($300,000) Dollars with the party of the first part as surety, to the State of Oregon, duly conditioned as required by law, all of which bonds were duly approved and accepted by the State and duly filed.

And whereas, the Title Guarantee & Trust Company, a private corporation, incorporated and organized under the laws of the State of Oregon, and having its principal office and place of business at the City of Portland, in said State, did on the 11th day of June, A. D. 1907, duly execute its official bonds as active depository for State funds, under the laws of said State, in the sum of Fifty Thousand (50,000) Dollars, with the party of the first part as surety to said George A. Steel, State Treasurer of the State of Oregon, duly conditioned as required by law, and did on the 20th day of June A. D. 1907, duly execute its further bond as a depository of State funds, under the laws of the said State, in the sum of Fifty Thousand ($50,000) Dollars, with the party of the first part as surety, to George A. Steel, State Treasurer of the State of Oregon, duly conditioned as required by law, both of which last named bonds were

delivered to, and accepted by said George A. Steel, State Treasurer, for and on behalf of the State of Oregon, and for its sole use and benefit.

And whereas, the Merchant's National Bank, incorporated and organized under the laws of the United States, with its principal office and place of business at the City of Portland, State of Oregon, did on the 14th day of January, A. D. 1907, duly execute its official bond as a depository of State funds, under the laws of said State in the sum of Forty Thousand ($40,000) Dollars with the party of the first part as surety to George A. Steel, State Treasurer, duly conditioned as required by law, which bond was duly approved and accepted on behalf of the State of Oregon, by said George A. Steel, State Treasurer.

And whereas, said George A. Steel, State Treasurer, at divers times since the 14th day of January, 1907, placed with said The Title Guarantee & Trust Company, in its bank at Portland, Oregon, divers sums of money from the general funds, and from the Common School, Agricultural College and University funds, belonging to the State of Oregon, aggregating a large amount, to-wit: over four hundred thousand ($400,000) Dollars, of which there remained a balance of one hundred and seven thousand four hundred and eighty-three dollars and eighty-one cents ($107,483.81) of said deposits from said General funds, and a balance of two hundred and eighty-eight thousand, four hundred and twenty-six dollars and eighty-seven cents ($288,426.87) of said deposits from said Common School, Agricultural College, and University funds, not drawn out nor appropriated by the State of Oregon when said bank closed and went into the hands of a receiver on the 6th day of November, A. D. 1907, and no part of which balances has been paid or returned by said The Title Guarantee & Trust Company, to the State of Oregon, or to said George A. Steel, State Treasurer, although payment thereof has been duly demanded.

And whereas, said George A. Steel, State Treasurer, since said 14th day of January, 1907, deposited with said Merchants' National Bank, at Portland, Oregon, from the general funds of the State of Oregon several sums of money, aggregating Twelve Thousand, four hundred and seventy-eight dollars and twenty cents ($12,478.20) no part of which was drawn out or appropriated by the State of Oregon, before said bank was closed and went into the hands of a bank examiner of the United States on the 11th day of November, A. D. 1907, and no part of said sum has been paid or returned to the State of Oregon, or to George A. Steel, State Treasurer, although payment thereof has been duly demanded.

And whereas, said George A. Steel, State Treasurer, upon being refused payment of said sums of money so deposited with the Title Guarantee & Trust Company, and remaining undrawn and unappropriated by the State of Oregon, as aforesaid, did on the 2nd day of November, A. D. 1907, demand of and receive from said Company a certain written assignment in the words and figures following:

(The paper therein quoted is identical in words and figures with

that already set forth in this Bill of Exceptions on pages 17
61 and 18.)

And whereas, said George A. Steel, State Treasurer, did on the 11th day of November, A. D. 1907, assign and transfer all his right, title and interest in and to all the notes and securities mentioned in said written assignment and in the contract thereof to the State of Oregon, as additional and further security against loss or prejudice on account of said deposits.

And whereas, there is some controversy between the parties hereto as to the liability of the party of the first part to the party of the second part, upon the several bonds above mentioned for the several amounts deposited as aforesaid in said banks, or some portion or part thereof.

And whereas, both parties to this agreement are desirous to adjust and settle all such controversies and differences without the delay and expense incident to litigation, on a basis which will insure the State of Oregon, as speedy payment of said balances of deposits in said banks, as possible and full payment and satisfaction thereof within a definite period of time with interest at the rate of five (5) per cent per annum from the 6th day of November, A. D. 1907, and give the party of the first part reasonable time and opportunity to enforce payment of said balances from other parties liable to make or contribute thereto, and from *other parties liable to make or contribute thereto, and from* any other securities held by the State of Oregon, and the assets of The Title Guarantee & Trust Company as may be allowed by law.

Now, therefore, in consideration of the premises, it is hereby mutually agreed and covenanted by and between the parties hereto as follows:

First. That immediately upon the execution of this agreement, the party of the first part will make and deliver to F. W. Benson, Secretary of State, its draft drawn on itself at New York for the sum of $12,478.20 payable to the State Treasurer of the State of Oregon, which draft shall be paid whenever presented with said
62 original depository bond of the Merchants' National Bank for $40,000 attached and will at the same time make and deliver to said F. W. Benson, Secretary of State, its other draft drawn on itself at New York, for the sum of $100,000 payable to the State Treasurer of the State of Oregon, which draft shall be paid whenever presented with said original depository bonds of the Title Guarantee & Trust Company for $50,000 each attached;

Second. The party of the first part will on or before the 31st day of December, A. D. 1909, pay or cause to be paid to the State of Oregon, the sum of $7,483.81 being the remainder of the balance of said deposit of the general funds of said state after payment of $100,000 by draft as aforesaid, and said balance of said deposit of $238,426.87 of the Common School, Agricultural College and University funds of said State with interest at the rate of five per cent per annum from the 6th day of November, A. D. 1907, until paid, and the said official bonds of George A. Steel, State Treasurer, with the party of the first part as surety for $250,000 and $300,000 re-

spectively, shall be and remain in full force and effect as security for such payments and until such time as said two principal sums of $7,483.61 and $288,426.67 respectively with interest thereon at the rate of five per cent per annum from the 6th day of November, A. D. 1907, shall be fully paid, and said two official bonds shall also be and remain in full force and effect as to all acts or omissions of said George A. Steel as State Treasurer, transpiring before the execution of this agreement as fully and effectually as though this agreement had never been entered into, but not as to any future acts or omissions of said George A. Steel as State Treasurer except his failure or refusal to account for and pay over or deliver to his successor in office or to any party legally entitled thereto, any money, book, paper, records, or property already received by him as such State Treasurer, and upon full payment or satisfaction of any other debts or liabilities heretofore contracted or incurred as aforesaid, both said bonds shall be delivered up and cancelled.

Third. The party of the second part will appoint and empower and does appoint and empower W. C. Bristol as its attorney to bring, control and conduct any and all actions, suits or proceedings he may elect in any Court or before any officer having jurisdiction in the name of either or both parties hereto, or to take any other action he may be advised, or to take and proceed upon any right or remedy which the State of Oregon may have against any person, firm, company, association or corporation, property, interest, obligation, (on surety bond or otherwise) or thing whatsoever, and to enforce, institute and proceed for damages for any act or omission in connection therewith or arising therefrom, and in case of the death or disability or termination of employment for the party of the first part of said W. C. Bristol, the party of the second part will appoint and empower any other attorney at law, the party of the first part may request in like manner with like authority and all moneys realized on any of said bonds or securities or collected from any of said parties shall be at once paid to and credited on said two principal sums, and interest, or in discharge of any other debt or liability incurred as aforesaid, and all expenses of prosecuting such actions, suits or proceedings including attorney's fees, shall be advanced and paid by the party of the first part, without the right of reimbursement from the party of the second part, except out of the Attorney's fees, costs and disbursements allowed and taxed therein, and after full payment and satisfaction of the claims of the party of the second part aforesaid, the surplus proceeds of any collection or recovery shall be applied to the reimbursement of the party of the first part for any sums paid out by it, as herein provided, and the surplus, if any, shall be held and distributed to the parties legally entitled thereto, and to the extent of the payments made as provided herein, the party of the first part shall be and become subrogated to all the rights and remedies of the State of Oregon and of any of its officers and agents, and to any collateral or other security held by it or them to the extent of such payments as are or may be made by the party of the first part hereunder.

Signed, and sealed in triplicate, the day and year first hereinabove written.

AMERICAN SURETY COMPANY OF NEW YORK.
F. W. LAFRENTZ, *Comptroller.*
J. W. MASON,
Assistant General Solicitor.
STATE OF OREGON,
GEORGE E. CHAMBERLAIN,
Governor.
A. M. CRAWFORD, *Attorney General.*
GEORGE E. CHAMBERLAIN,
Governor,
F. W. BENSON,
State of Oregon, Secretary of State,
GEORGE A. STEEL, *Treasurer,*
Composing the State Land Board of Oregon.

The defendant identified the said instrument and proved the signatures thereto, and the authority of F. W. Lafrentz and J. W. Mason to execute the same on behalf of American Surety Company of New York was admitted by the State. The State objected to the admission of the said instrument in evidence as irrelevant, incompetent and immaterial and because it was not proper for the defendant to show in this case by that character of evidence that the Surety Company had paid the money to the State of Oregon, and because the instrument shows on its face that the payment of the money was extended for a considerable period of time, because the paper is a hearsay as to all of its recitals, because it was a paper between other parties concerning funds that are in controversy here and constitute no excuse or justification for the defendant. Thereupon the objection of the State was sustained, and the instrument in question was excluded, and the defendant was allowed an exception to the ruling of the Court in excluding the same.

65 There was no evidence of any agreement between the State Treasurer and the Title Guarantee and Trust Company or any of its officers fixing any time within which the Educational Funds of the State were not to be withdrawn or requiring any notice as a condition to their withdrawal, nor was there any evidence with reference to the manner and the circumstances under which said funds were left with the Title Guarantee & Trust Company except as aforesaid. There was evidence tending to show that the funds left or deposited with the Title Guarantee and Trust Company to the credit of George A. Steel, State Treasurer, Educational, included funds belonging to each of the funds described in the information.

The foregoing is the substance and effect of all the testimony in the above entitled cause. The testimony having closed, the defendant requested the court to charge the jury as follows:

"The jury is instructed to find the defendant Ross not guilty."

But the court declined to so instruct the jury, and to the refusal of the court to give the aforesaid instructions the defendant excepted

and his exception was allowed. The defendant then requested the Court to charge the jury as follows:

"The defendant is charged in this case jointly with his co-defendants of receiving $288,426.87 belonging to the Irreducible School Fund, the Agricultural College fund and the University Fund of the State of Oregon.

It is further charged that these moneys were in the possession of the defendants J. Thorburn Ross, George H. Hill, John E. Aitchison and T. T. Burkhart, and that being so in their possession the said defendants converted the said moneys to their own use.

The penalty for the offense so charged is imprisonment in the State Penitentiary of the State of Oregon for a period of not less than one year and not more than fifteen years, together with a fine of twice the amount of money converted.

Should you find the defendant guilty, it would be your
66 duty by your verdict to find the amount of money converted by him to his own use out of the particular state funds above referred to in order that the Court might have a basis on which to impose this fine."

But the Court declined to so instruct the jury, and to the refusal of the Court to give the aforesaid instruction the defendant excepted and his exception was allowed. The defendant then requested the Court to charge the jury as follows:

"Should you find the defendant guilty, it would be the duty of the Court in entering a judgment upon your verdict to impose a fine upon him and to direct that he be imprisoned in the County Jail until the fine be satisfied, specifying the extent of the imprisonment which cannot exceed one day for every two dollars of the fine imposed."

But the Court declined to so instruct the jury, and to the refusal of the Court to give the aforesaid instruction the defendant excepted and his exception was allowed. The defendant then requested the Court to charge the jury as follows:

"If you find that the State Treasurer deposited any portion of the State School Fund, the Agricultural College Fund and the University Fund in a bank with which the defendant was connected, and that the deposit was a general deposit subject to check, and that there was no contract with the bank whereby the bank was entitled to notice as a condition to the withdrawal of the money by the State Treasurer, I instruct you that such a deposit created the relation of debtor and creditor; that the State Treasurer and the State in such case would not be entitled to the return of the identical money left with the bank, and that the defendant Ross cannot be convicted in this proceeding of converting to his own use any such funds."

But the Court declined to so instruct the jury, and to the refusal of the Court to give the aforesaid instruction the defendant excepted and his exception was allowed. The defendant then re-
67 quested the Court to charge the jury as follows:

"If you find that the dealings of the State Treasurer were

with the defendant Ross or with the other defendants in their official capacity as officers and directors of the Title Guarantee and Trust Company, then I instruct you that any receipt and possession of the State School Fund arising by said dealings would be a receipt of the same by the Title Guarantee and Trust Company, and a possession of the same by the Title Guarantee and Trust Company, and such a receipt or possession cannot form a basis for a conviction of this defendant."

But the Court declined to so instruct the jury, and to the refusal of the Court to give the aforesaid instruction the defendant excepted and his exception was allowed. The defendant then requested the court to charge the jury as follows:

"Unless you find beyond a reasonable doubt from the evidence that some portion of the Irreducible School fund, the Agricultural College Fund and the University Fund of the State of Oregon, or of some one or more of said funds came into the possession of the defendants individually, there can be no conviction in this case, and your verdict should be, Not guilty."

But the Court declined to so instruct the jury, and to the refusal of the court to give the aforesaid instruction the defendant excepted and his exception was allowed. The defendant then requested the court to charge the jury as follows:

"It is charged in the information that $288,426.87 belonging to the Irreducible School Fund, the Agricultural College Fund and the University Fund of the State of Oregon came into the possession of the defendants J. Thorburn Ross, John E. Aitchison, George H. Hill and T. T. Burkhart. Unless you find beyond a reasonable doubt that some portion of the said fund came into the joint possession of these four defendants, then I instruct you that there can be no conviction in this case, and that your verdict should be, Not guilty."

But the Court declined to so instruct the jury, and to the
68 refusal of the court to give the aforesaid instruction the defendant excepted and his exception was allowed. The defendant then requested the court to charge the jury as follows:

"It is one of the essential elements of the crime with which the defendant is charged in this information that he has converted the moneys in question to his own use. I instruct you that unless you are satisfied beyond a reasonable doubt that he did convert such funds to his own use your verdict should be, Not guilty. It is not sufficient for the State to show you beyond a reasonable doubt that the funds in question were converted to the benefit of the Title Guarantee and Trust Company, or of any other corporation or person. Unless you find that this defendant has converted the said moneys to his own use individually he cannot be convicted of the offense charged."

But the Court declined to so instruct the jury, and to the refusal of the court to give the aforesaid instruction the defendant excepted and his exception was allowed. The defendant then requested the court to charge the jury as follows:

"If the defendant Ross acted in good faith, believing and having a right to believe that the manner in which the Educational account with the State Treasurer was carried was a proper and lawful manner of carrying the same, and believing and having a right to believe that it was proper and lawful to mingle the State Educational funds with the other funds of the Title Guarantee and Trust Company, he cannot be convicted in this case."

But the Court declined to so instruct the jury, and to the refusal of the court to give the aforesaid instruction the defendant excepted and his exception was allowed. Thereupon the court instructed the jury as follows:

"Gentlemen of the jury, the defendant has been accused by the information in this case of the crime of larceny. He has pleaded that he is not guilty of that crime, and so you are called upon to decide the matter of fact at issue in this case.

At the beginning of the trial you obligated yourself by your oaths to well and truly try the matter at issue between the plaintiff and defendant, and a true verdict give according to the law and evidence as given upon the trial.

The evidence has been given to you, and you will now receive from the Court instructions in the law applicable to the case under consideration.

You are required under the constitution and laws of the land to submit to the direction of the Court as to the law. You have heard the evidence and the addresses to the jury from the counsel, and the ruling of the court as to the law of the case which has occurred during the progress of the trial. I must warn you that you are not to be led away from the instructions of the Court by such things. It is a duty incumbent on the Court under the law and constitution of the land to declare what the law is, and the jury must receive from the Court the instructions relative to the law, and be governed by those instructions. It is not for the jurors to say that the rule of law should be one thing or another. It is the exclusive power and province of the Court to declare what the law is, and the jury must follow the direction of the Court as to the law, so that if an error is thereby committed, it may be corrected on appeal to the Supreme Court.

On the other hand it is for the jury alone to declare by their verdict the facts of the case, or the truth of any matter in controversy; and their decision in that respect, as embodied in their verdict, when arrived at in a regular and legal manner is final and conclusive upon the Court beyond appeal. In some respects therefore the greatest responsibility of the trial rests upon the Jury. You are the judges of the effect and value of the evidence in this case. In the exercise of this power, however, you are not to act arbitrarily, but you must act with lgeal discretion and subordination to the rules of evidence. The verdict you return must be the result of a careful and impartial investigation of all the evidence, under the rules of law announced by the Court. You are not to reach a verdict by mere guess work, or by chance, or arbitration, or

otherwise than as the truth shall appear from the evidence in the case.

You are not merely to lump off this case arbitrarily, you are not to decide for or against the defendant because he is a banker, or because his bank has failed, or on any other ground, than as disclosed by the evidence in the case. You are to weigh all the evidence on both sides of this case and determine the truth of the matter in dispute.

In estimating the value and credibility of evidence you are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your mind, against a less number or against a presumption, or other evidence satisfying your minds. In other words, you are authorized to believe or act upon the statements of a less number of witnesses against those of a greater number, if the testimony of the less number impresses you as being more worthy of belief. Again, if all the witnesses in the case appear to be of equal credibility, you would be authorized, so far as the case depends upon that testimony, to follow the declarations of the majority of the witnesses. You are to look for the quality of the evidence, as well as the number of witnesses testifying, and are not necessarily bound by the mere number of witnesses; and as to that, the direct evidence of one witness, when entitled to full credit, is sufficient for the proof of any fact necessary to be established in this case.

It is presumed that every witness speaks the truth. This presumption, however, may be overcome by the manner in which he testifies, by the character of his testimony, by evidence affecting his character or motives, or by contradictory evidence.

You are the exclusive judges of the credibility of each witness; it is for you alone to determine how worthy of belief may be the statement of any witness, and in so doing you may take into consideration all the elements to which I have just alluded. You
71 have seen and heard the witnesses; you have observed their manner of testifying, you can judge of the probability of their statements, and their motives in testifying, and you must determine in cases of contradictory testimony, where the truth lies, so far as you can from a consideration of all the testimony.

A witness false in one part of his testimony, is to be distrusted in others. It does not necessarily follow, however, that any witness is false, who is contradicted by other witnesses; the contradicting witness may be himself false, and you must determine who is the false witness in such case.

This being a criminal case, it is not sufficient for the State to show merely a better case than that of the defendant, or to establish a strong probability of the guilt of the defendant. Before you can find the defendant guilty, you must be satisfied of his guilt beyond a reasonable doubt. Every man is presumed to be innocent until he is proven guilty. In a criminal case the burden devolves upon the State of proving its case to the satisfaction of the jury beyond a reasonable doubt. I therefore instruct you that the defendant is entitled to the benefit of every reasonable doubt, and you cannot

find him guilty of the offense with which he is charged unless the State has satisfied you beyond a reasonable doubt on every one of the essential elements constituting the crime charged.

A reasonable doubt is defined to be that state of the case which after a careful comparison and consideration of all the evidence, leaves the minds of the jurors in that condition, that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. Again it is a rule of law that if any reasonable theory consistent with the innocence of the defendant can be derived from the testimony, the jury should adopt that theory and acquit the defendant.

A reasonable doubt may be raised, not only from the strength of the testimony on the part of the defendant, but also from a defect, or weakness of the testimony for the State. It is not re-
72 quired, however, that the State shall demonstrate the guilt of the defendant to an absolute mathematical certainty, and exclude every frivolous, unreasonable, or captious objection that may occur to an inventive mind. Moral certainty to the exclusion of a reasonable doubt is as far as the law required the State to go with the proof in order to justify a verdict of guilty.

The theory of the State, upon which it relies to sustain this information is in substance that the defendants named, including the defendant J. Thorburn Ross, were the directors of the Title Guarantee & Trust Co.; that the defendant J. Thorburn Ross was the president of that institution; that the defendants on the 9th day of September, 1907, in the County of Multnomah and State of Oregon then and there being, and then and there pretending to act for and on behalf of said Title Guarantee & Trust Co. did then and there have in their possession and under their control as officers and directors of said Title Guarantee & Trust Co. as aforesaid $288,426.87 then and there belonging to the State of Oregon and then in the possession and under the control of said defendants as aforesaid for the State of Oregon, and for safe keeping, and to be returned by said defendants to the State and to the legal custodian of State money, upon lawful demand therefor, said money being then and there lawful money of the United States, which belonged to and was a part of the irreducible school fund, agricultural college fund and university fund of said state, that said defendants and each of them then and there well knew said money belonged to said State and to said irreducible school fund, agricultural college fund, and State university fund of said State as aforesaid; and defendants then and there having possession of said money as aforesaid belonging to said state as aforesaid and for said state as aforesaid, for safe keeping and to be returned to said state or said legal custodian of said money, did then and there wilfully, unlawfully and feloniously convert the same to their own use knowing it to be money of the State and belonging to the funds mentioned.

73 That is the substance of the charge which the State makes against the defendant. He has pleaded not guilty, and as I have before stated to you it is incumbent upon the State now if they would hold the defendant by a verdict of guilty, to prove to

you substantially to your satisfaction, beyond a reasonable doubt the truth of this charge mentioned in the Information.

At the outset of the case the defendant is presumed to be innocent of any crime or wrong; and this is a species of evidence which accompanies him throughout the trial, and weighs in his favor until it is overcome by other evidence which will satisfy you of his guilt beyond a reasonable doubt. It is a disputable presumption, however, and may be overcome by other evidence. As to whether it is overcome is for you to determine. I cannot undertake to say anything to you about the weight of the testimony, or what I believe about the case, or what you ought to believe; but you are the exclusive judges of the truth of the matter in controversy, and of the credibility of the witnesses.

It must be proven that the crime charged occurred at some time within three years next prior to the filing of this information, it having been filed on March 6th, 1908. It is alleged the crime occurred on the 9th of September, 1907. The State is not held to proof of the exact date named in the information, but it is sufficient to prove any date within three years next prior to the filing of the information.

It is charged also that it occurred in the County of Multnomah and State of Oregon, and that must be proven to your satisfaction beyond a reasonable doubt that it occurred in that County.

There are four defendants including the defendant now on trial, named in this Information. The law on that subject is that all persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the crime, or aid and abet in its commission, though not present, are principals, and to be tried and punished as such.

If the defendant, as director of the Title Guarantee & Trust Company, or as an individual aided or abetted in the act charged in the information he would be as much liable for it as if he were a principal, or the only one concerned, but as to whether the defendant aided or abetted in the act charged in the information is for you to determine from the evidence; but the defendant could not save himself from prosecution for a criminal act, if one was committed, by merely showing that he had acted as director of the Title Guarantee & Trust Co.

On the other hand he cannot be convicted merely because he was a director of that Company, even if the Title Guarantee & Trust Company got all the money and used it for its own purposes; so far as that is concerned, if he is going to be found guilty of this charge, he must be shown to have had guilty knowledge and participation in the act complained of.

The jury is instructed that the State must satisfy you of the guilty intent on the part of the defendant, and this intent must be proven to your satisfaction beyond a reasonable doubt by the testimony. It is presumed that an unlawful act is done with an unlawful intent. It is for you to determine whether or not the defendant

had an unlawful intent within the meaning of the rules of law which I have given you.

If you find beyond a reasonable doubt that the defendant did the unlawful act, the presumption would be that he did that with an unlawful intent; and you are to determine whether he understood the nature of the act he was doing. Ignorance of the law will excuse no man. The defendant must know at his peril that it is wrong and unlawful to violate the Statute upon which this Information is drawn. He must know at his peril that if he has in his possession any monies whatever belonging to the State, that is, of the funds named in this information, and shall in any way convert to his own use any portion of it, that he would be guilty of a crime he must know that at his peril.

The question is whether he did this act, knowing that he was doing it. It is charged now that the defendant knew that this money was a part of the irreducible school fund, agricultural college fund, and university fund, and having been so alleged it must be so proven. It must be proven to your satisfaction beyond a reasonable doubt that the defendant knew that the bank had the money, or that he had it as director of the bank, or that the defendants including all of them, had the money of the State belonging to those three funds mentioned in the information, and he must be shown by the evidence beyond a reasonable doubt to have participated in the conversion of it, as described in the information. If he did not know that it was the State money, or, if you have a reasonable doubt as to whether he knew that was State money of those three funds, he cannot be convicted.

Further it is alleged in the information that he converted lawful money of the United States as described in the information. The Statute is directed against a conversion of the money, and it must be shown to your satisfaction beyond a reasonable doubt, that the defendant participated in an illegal conversion of money as charged in the information. There has been some testimony about the dealing of the bank with the State Treasurer, and I will say on that point that a conversion of the checks or drafts without getting the money on them would not constitute the crime charged in the information; but the jury may consider from the evidence, whether the defendant, as director, or individually, got the money named in the information on the checks which you have heard described in the evidence, or having the same controverted it to his own use. If the defendant either acting with the others as director of the Title Guarantee & Trust Co., or acting with them as individuals, collected money on drafts sent by the State Treasurer and that money belonged to these funds named in the information that would be within the meaning of the indictment, and within the meaning of the law forbidding such act. It is for you to determine now whether or not he did collect the money, or aid and abet in its collection, and whether he converted it.

It is further alleged that this defendant converted the money to his own use. On that point I will say to you that it is the duty of

the State Treasurer under the law as to the funds named in the information, to receive and have charge of all monies put into the State Treasury and he shall pay out the same as directed by law. The State Treasurer may not loan, with or without interest, any portion of the funds of the State, without being guilty of a crime, but he is required to keep such funds safely, and for that purpose may deposit them in a bank, provided they are at all times subject to order, and there is no fixed period during which he has no right to demand their return.

If the State Treasurer put money of the agricultural fund, university fund or common school fund into the custody of a bank, of which the defendant was president, neither the defendant nor the bank acquired any greater right to the control over such money than the Treasurer had. It would then be the duty of the bank, and of the defendant acting for the bank, if he knew that there was State money of these three funds, or of either of them, to restore an equivalent amount of money to the Treasurer on demand. If the State money of these funds was in the possession of the defendant as director of the Title Guarantee & Trust Co., and this defendant knew it to be such money, and failed to restore it to the State Treasurer when demanded, that would be converting the money to his own use within the meaning of this act and within the meaning of the information, and it would be the same result if they took any action that amounts to the use of such money to pay the obligations of the Title Guarantee & Trust Co. The question is whether the defendant Ross is shown to have done that, and whether he knew that the money used to pay the obligations of the Title Guarantee & Trust Co., if such money was so used,
77 was money of the State belonging to these three funds, or of either of them. It is not indispensible to show that the defendant profited as an individual by the transaction. For instance, if I have Mr. Kirsch's money which he has left with me to take care of and I go to Mr. Hines' store and buy a suit of clothes and give it to Mr. Ritchie, that would be a conversion of the money to my own use, that is a purpose of my own to which I have put that money although I do not profit by it a cent; that would be a conversion of Mr. Kirsch's money. Whether the defendant has converted this money is for you to determine, I cannot intimate what I believe about it, or that he did or did not—you must apply the rules of law which I give you and determine this question of *fact*.

If the defendant is shown, under the rules of law which I have given you, to be guilty as charged, it is of no consequence whether or not the State has or has not lost the money, or suffered loss. The liability of the defendant under the information is for his own act, irrespective of subsequent transactions by others looking to the reimbursement of the State.

If you find the defendant guilty under the rules of law I have given you, you will say so by your verdict, and you will also find as near as you can from the testimony the amount of money de-

scribed in the information and converted by the defendant, either individually or in connection with the other defendants. In that event your verdict would be "We the jury in the above entitled criminal action find the defendant J. Thorburn Ross guilty as charged in the information"—and find the amount of money as alleged so many dollars, ascertain that sum of money and insert the sum of money in the blank which I have left in the verdict. That is a question among other things for you to determine.

If after considering all the testimony fairly and dispassionately, without passion or prejudice, or anything except careful consideration, you find you have a reasonable doubt as to the defendant's guilt, say by your verdict, "We the jury in the above entitled criminal action find the defendant J. Thornburn Ross not guilty."

78 The defendant excepted to the following portion of the foregoing charge:

"If the defendant, as director of the Title Guarantee & Trust Company, or as an individual aided or abetted in the act charged in the information he would be as much liable for it as if he were a principal, or the only one concerned, but as to whether the defendant aided or abetted in the act charged in the information is for you to determine from the evidence; but the defendant could not save himself from prosecution for a criminal act, if one was committed, by merely showing that he had acted as director of the Title Guarantee & Trust Company."

The defendant excepted also to the following portion of the foregoing charge:

"The defendant must know at his peril that it is wrong and unlawful to violate the Statute upon which this information is drawn. He must know at his peril that if he has in his possession any monies whatever belonging to the State, that is, of the funds named in this information, and shall in any way convert to his own use any portion of it, that he would be guilty of a crime—he must know that at his peril."

The defendant excepted also to the following portion of the foregoing charge:

"It is charged now that the defendant knew that this money was a part of the irreducible school fund, agricultural college fund, and university fund, and having been so alleged it must be proven. It must be proven to your satisfaction beyond a reasonable doubt that the defendant knew that the bank had the money, or that he had it as director of the bank, or that the defendants, including all of them, had the money of the State belonging to those three funds mentioned in the information, and he must be shown by the evidence beyond a reasonable doubt to have participated in the conversion of it, as described in the information."

79 The defendant also excepted to the following portion of the foregoing charge:

"There has been some testimony about the dealing of the bank with the State Treasurer, and I will say on that point that a conversion of the checks or drafts without getting the money on them would not constitute the crime charged in the information;

but the jury may consider from the evidence, whether the defendant as director, or individuually got the money named in the information on the checks which you have heard described in the evidence, or having the same converted it to his own use. If the defendant either acting with the others as director of the Title Guarantee & Trust Co., or acting with them as individuals, collected money on drafts sent by the State Treasurer, and that money belonged to these funds named in the information, that would be within the meaning of the indictment, and within the meaning of the law forbidding such act. It is for you to determine now whether or not he did collect the money, or aid and abet in its collection, and whether he converted it."

The defendant excepted also to the following portion of the foregoing charge:

"If the State Treasurer put money of the agricultural fund university fund or common school fund into the custody of the bank, of which the defendant was president, neither the defendant nor the bank acquired any greater right to the control over such money than the Treasurer had. It would then be the duty of the bank, and of the defendant acting for the bank, if he knew that there was State money of these three funds, or of either of them, to restore an equivalent amount of money to the Treasurer on demand. If the State money of these funds was in the possession of the defendant as director of the Title Guarantee & Trust Co., and this defendant knew it to be such money, and failed to restore it to the State Treasurer when demanded, that would be converting the money to his own use within the meaning of this act and within the meaning of the information, and it would be the same result if they took any action that amounts to the use of such money to pay the
80 obligations of the Title Guarantee & Trust Co."

The defendant excepted also to the following portion of the foregoing charge:

"It is not indispensible to show that the defendant profited as an individual by the transaction. For instance, if I have Mr. Kirsch's money which he had left with me to take care of and I go to Mr. Hines' store and buy a suit of clothes and give it to Mr. Ritchie, that would be a conversion of the money to my own use, that is a purpose of my own to which I have put that money although I do not profit by it a cent; that would be a conversion of Mr. Kirsch's money."

The witnesses whose testimony is referred to as aforesaid were all sworn to tell the truth, the whole truth and nothing but the truth. This Bill of Exceptions is prepared and presented and settled by the Court upon the agreement of counsel for the State and for the defendant J. Thorburn Ross within the time allowed therefor; that all the exceptions hereinbefore noted were regularly taken at the time of the said trial and allowed by the Court.

GEO. H. BURNETT, *Judge.*

Dated June 12th, 1908.

O. K.

MARTIN L. PIPES.
WALLACE McCAMANT.

81 COUNTY OF MULTNOMAH,
State of Oregon, ss:

Due service of the within proposed Bill of Exceptions is admitted this 22nd day of May, 1908.

JOHN MANNING,
District Attorney 4th Jud. Dist.,
By B. E. HANEY, *Deputy.*

(Endorsed:) No. 9001. In the Circuit Court of the State of Oregon for Marion County. State of Oregon, Plaintiff, vs. J. Thorburn Ross, et al., Defendants. Bill of Exceptions. Filed June 19th, 1908. R. D. Allen, Clerk. Snow & McCamant, Attorney for Defendant J. Thorburn Ross.

82 And afterwards on the 8th day of July, 1908, the following Stipulation was filed herein to-wit:

In the Circuit Court of the State of Oregon for Marion County.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, GEORGE H. HILL, JOHN E. AITCHISON, and T. T. BURKHART, Defendants.

It is stipulated that an order may be entered extending to July 30th, 1908, the time for filing the transcript on the appeal of J. Thorburn Ross from the Judgment rendered against him in the above entitled cause.

GEO. J. CAMERON,
District Attorney.
M. L. PIPES,
WALLACE McCAMANT,
Of Attorneys for Defendant J. Thorburn Ross.

Endorsed: #9001. In the Circuit Court of the State of Oregon for Marion County. State of Oregon, Plaintiff, vs. J. Thorburn Ross et al., Defendants. Stipulation for extension of time. Filed July 8th, 1908. R. D. Allen, Clerk. By Bertha L. Allen, Deputy. Snow & McCamant, Attorneys for Defendant Ross.

83 #9001.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, GEORGE H. HILL, JOHN E. AITCHISON, and T. T. BURKHART, Defendants.

On stipulation of the parties it is ordered that the time for preparing and filing the transcript in the Supreme Court on the appeal

of the Defendant J. Thorburn Ross, be and it is hereby extended to July 30th, 1908.

GEO. H. BURNETT, *Judge.*

July 10th, 1908.

84 STATE OF OREGON,
County of Marion, ss:

I, R. D. Allen, County Clerk of the County of Marion and State of Oregon and ex-officio Clerk of the Circuit Court in and for said County and State, do hereby certify that the foregoing transcript of Pleadings, papers, Journal entries and Bills of Exceptions, Notice of Appeal and Undertaking on appeal, constituting the Judgment Roll, has been by me compared with the original and that it is a true and correct transcript of such Pleadings, Papers Journal entries, Bills of Exceptions and Notice of Appeal and Undertaking, constituting the Judgment Roll, and of the whole thereof, as the same appears on file and of record in my office and in my care and custody.

Witness my hand and official seal this 25th day of July, A. D. 1908.

[SEAL.] R. D. ALLEN, *County Clerk,*
By BERTHA L. ALLEN, *Deputy.*

Endorsed: In the Circuit Court of the State of Oregon for Marion County. Department No. 1. No. 9001. State of Oregon, Respondent, vs. J. Thorburn Ross, et al., appellant. Transcript on appeal. Filed July 30th, 1908. —— ——, Clerk of Supreme Court. By —— —— Deputy. Wallace McCamant and Wm. M. Kaiser, Atto'ys for Appellant Ross.

85 In the Supreme Court of the State of Oregon.

STATE OF OREGON, Respondent,
v.
J. THORBURN ROSS, Appellant; GEO. H. HILL, T. T. BURKHART, and JOHN E. AITCHISON, Defendants.

Appeal from the Circuit Court for Marion County.

The Honorable Geo. H. Burnett, Judge.

Argued and Submitted July 29, 1909.
Geo. J. Cameron and Martin L. Pipes, for Respondent.
Wallace McCamant, William P. Lord and William M. Kaiser for Appellant.
Eakin, J.
Affirmed.

(Endorsed:) "Filed Oct. 19, 1909. J. C. Moreland, Clerk.

86 This defendant is charged, by information, jointly with Geo. H. Hill, T. T. Burkhart, and John E. Aitchison, with the crime of larceny, committed in Multnomah county, Or., and upon change of venue the case was transferred to Marion county for trial. The substance of the charge is that on the 9th day of September, 1907, the Title Guarantee & Trust Company (hereafter referred to as the "Trust Company") was a corporation, carrying on a banking business of which the defendants were directors, and J. T. Ross, president, Geo. H. Hill, vice president, T. T. Burkhart, treasurer, and that the defendants on that date, pretending to act for said Trust Company, had in their possession and control, for safe-keeping, as officers and directors of the Trust Company, $288,426.87, belonging to the state of Oregon, and being a part of the irreducible school fund, agricultural college fund, and the university fund (hereafter referred to as the "educational fund"); that defendants, well knowing that such money belonged to that fund, did then and there willfully, unlawfully and feloniously convert the same to their own use, which money, prior to that date, they—as officers and directors of the Trust Company—had received for the state for safe-keeping, from Geo. A. Steel as State Treasurer.

The facts upon which the issues here arise are that the Trust Company, since the year 1904, has been engaged in banking, but not exclusively in such business; that it had also prepared abstracts of title, written title insurance, made mortgage loans, receiving compensation for such services as a broker; that it had sold real estate on commission, and performed other services for compensation; that on the 14th day of January, 1907, when Geo. A. Steel took the office of State Treasurer, he had $400,000 of the state's money on deposit, subject to his check, in various banks within the state. Of this sum $85,000 was deposited with the Trust Company. At that time there was no segregation of the funds of the Treasurer, as between the educational and general funds, except on the books of the Treasurer, and such banks had not been notified to which fund the deposits belonged. Thereafter Steel continued the account with the Trust Company in the name of "Geo. A. Steel, State Treasurer," and deposits were made and checks drawn against the same from time to time, until the 3d day of June, 1907, at which time the Trust Company had been designated by the Treasurer as an active depository of the state, under the provision of section 6 of an act of the Legislative Assembly of the State of Oregon, adopted in the year 1907, providing for state depositories for state funds (Laws 1907, p. 248), at which time, evidently for the purpose of complying with the terms of such statute, Steel segregated the funds, and accordingly wrote to the Trust Company as follows:

"STATE OF OREGON, TREASURY DEPARTMENT,
"SALEM, *June* 3, 1907.

"The Title Guarantee and Trust Company, Portland, Oregon—Gentlemen: I inclose herewith for credit of Geo. A. Steel, State Treasurer, Educational, the following checks:

No. 319, Geo. A. Steel, State Treasurer, on you.....	$272,449 02
No. 34, Geo. A. Steel, State Treasurer, on Ladd & Tilton	2,600 00
Total	$275,049 02

"Yours very truly,

"GEO. A. STEEL,
"State Treasurer."

Thereupon, on the 5th day of June, 1907, an account was opened on the books of the Trust Company entitled, "Geo. A. Steel, Treasurer, Educational," the first item of which was the credit of the above amount, and thereafter, prior to November 6, 1907, the time of the appointment of the receiver for the Trust Company, many other credits were made in that account for checks sent by Steel for deposit therein, and on that day the balance to the credit of that account was $288,423.87. The remittances were all made in checks and drafts, except as above mentioned, and, except as stated, there was no evidence of possession of the money by defendants, or that the checks had been collected or converted into cash by the Trust Company, or any one. Until the 20th day of August, 1907, the Trust Company always had on hand cash exceeding the balance due from it on the educational account, but on the next day it was about $300 less than such balance. This deficiency increased thereafter until November 6, 1907, when the Trust Company's cash on hand lacked $274,882.73 of being equal to the balance due on such account, and on that date all its cash was turned over to the receiver.

Defendant Ross testified that he did not convert to his own use any money whatever belonging to the educational fund of the state. When asked, "How much money did you get from the state of Oregon as deposited by the State Treasurer with the Trust Company?" his answer was, "I never received any money from
87 the State of Oregon." A written demand was made by Steel, as Treasurer, on the Trust Company for the amount of such account on November 12, 1907, service of which was accepted for the Trust Company by defendant Ross, as president. Steel testified that he did the business with the bank, and had no business with defendants; that he might have corresponded with Ross, but thought not; may have talked with him about depositing these funds, after the law took effect, but does not recollect. But the account was segregated, and he says he did have an arrangement or agreement with Burkhart, Ross, Aitchison, or Hill about the manner or arrangement by which these funds would be deposited in the bank, but did not think that Ross knew, at the time, any further than is disclosed by Steel's instructions at the office. He says he probably spoke to him, but does not remember any conversation. The principal dealings were with Ross or Burkhart. He further testifies that, pending the passage of the bill providing for depositories before the Legislature of 1907, he probably consulted with Ross about it, and sent him copies of the bill.

The trial resulted in a verdict against the defendant of guilty, and a finding by the jury that the amount of money converted was $288,426.87. Thereafter defendant moved the court in arrest of judgment on the ground that the information does not state facts sufficient to constitute a crime, and also a motion for a new trial for insufficiency of the evidence to justify the verdict, and errors of law occruing at the trial, which motions were denied. Thereupon judgment was rendered against defendant that he be imprisoned in the penitentiary of the state of Oregon for the term of five years; that he be adjudged to pay a fine in the sum of $576,853.74; that he be imprisoned in the county jail of Multnomah county, Or., until such fine is paid, not exceeding 288,426 days; and that the state recover of and from the defendants its costs and disbursements. From this judgment defendant appeals.

Eakin, J. (after stating the facts as above). The statute (B. & C. Comp.) upon which this prosecution is based provides: "Sec. 1807. If any person shall receive any money whatever for this state * * * or shall have in his possession any money whatever belonging to such state * * * and shall in any way convert to his own use any portion thereof * * * such person shall be deemed guilty of larceny. * * *"

The first question for consideration relates to the character of the deposits made by the State Treasurer with the Trust Company, whether they were general or special, and this depends on the terms of the statute of 1907, under which the deposits were made (Laws 1907, p. 248), which took effect May 26, 1907. The portions of the act applicable here are as follows:

"SECTION 1. It shall be the duty of the State Treasurer, on the first Monday in June of each year, to designate such banks and trust companies within this state, as he may, under the provisions of this act, deem eligible to be made state depositories, for the purpose of receiving on deposit funds of this state, and paying out the same on order or checks of the State Treasurer."

"SEC. 3. The State Treasurer shall deposit, and at all times keep on deposit in national banks doing business in the state of Oregon, or other banks and trust companies doing business within this state, as shall have been approved under the provisions of this act as herein provided, the amount of money in his hands belonging to the several funds in the state treasury, and any such bank or trust company may file with the State Treasurer its application for the privilege of keeping on deposit such funds or some part thereof. All such deposits shall be subject to payment when demanded by the State Treasurer on his check, and any bank receiving and holding any such deposit as aforesaid shall be required to pay and shall pay to the state for the privilege of holding the same, interest at the rate prescribed by the State Treasurer as hereinafter provided, which rate of interest shall be not less than two per cent. per annum. * * *

"SEC. 5. For the security of funds so deposited under the provisions of this act, the State Treasurer shall require all such depositories to deposit securities of the kind and character hereinafter described, or to give bonds for the payment of such deposits and the

interest thereon. Said bonds, when given, shall run to the state of Oregon, and, together with the securities offered, are to be approved as to the legal form by the Attorney-General. * * * The bond provided for under this act shall be a surety company bond. * * * [Here follows the form of bond to be given by a surety company.]"

"SEC. 9. The word 'bonds,' whenever used in this act, shall be held to include bonds furnished by surety companies authorized and qualified to do business in this state. The word 'security' or 'securities' shall be construed to include United States bonds," etc.

"SEC. 16. The word 'funds' used in this act shall apply to all funds in the state treasury except the common school, agricultural college, and university funds. Nothing in this act shall be construed to deprive the State Land Board of the power to invest or dispose of the funds derived from the sale of public lands as is now or may be provided by law."

Thus it will be seen that the educational funds are excepted from the provisions of sections 1 to 5, inclusive. But sections 6,
88 7, and 8 include the educational fund, and provide as follows:

"SEC. 6. The State Treasurer may designate a bank or trust company in the city of Salem or a bank or trust company in the city of Portland as an active depository for the collection of any drafts, checks, certificates of deposit and coupons that may be received by him on account of any claim due the state.

"SEC. 7. The bank or trust company, designated as such active depository, shall be required to give security to the state to be approved by the State Treasurer for the prompt collection of all drafts, checks, certificates of deposit, coupons that may be delivered to such active depository by the State Treasurer for collection; also, for the safe-keeping and prompt payment on the State Treasurer's order of all such collections, also for the payment of all drafts that may be issued to said State Treasurer by such active depository.

"SEC. 8. The State Treasurer, on receipt of any draft, check or certificate of deposit, on account of state dues, may place the same in such active depository for collection, and it shall be the duty of such active depository to collect the same without delay, without charge for its services for such collection, or for exchange, and to notify the State Treasurer when collected. The compensation to be paid by such active depository shall be fixed by the State Treasurer upon the best terms obtainable for the state."

Section 10 contains the following clause: "The State Treasurer shall not be liable personally or upon his official bond for any moneys that may be lost by reason of the failure or insolvency of any bank which becomes a depository under this act."

The purpose of this statute is to secure to the state interest on state funds, and to provide depositories for state moneys. Of this act sections 1 to 5, inclusive, relate to the creation of depositories and payment of interest on money deposited, and applies to all state funds other than educational funds, but has no application to them. Sections 6, 7, and 8 provide for active depositories, and apply equally

to the general and educational funds. It is evidently not the purpose of these sections that the active depositories shall loan or be required to pay interest on funds deposited thereunder, as section 5 provides for the security that shall be taken from general depositories, and if the active depositories could loan funds deposited therein, under the provisions of sections 6, 7, and 8, the effect would be to nullify the requirements of section 5 as to the character of the security to be given for the general deposits. The writer is unable to understand the purpose of the last clause of section 8, unless it is to give to the state the benefit of any deal that the Treasurer might be able to make for compensation. But whatever the intention, it cannot change the meaning of these sections.

Thus it appears that deposits, if they may be called such, in the active depositories, as provided in section 6, are made for an entirely different purpose than those provided for in section 3, and are only for a special purpose, namely, for the collection of the checks and drafts transmitted by the Treasurer, the safe-keeping and prompt payment of the money upon the treasurer's order. For the security of funds of the general depositories the State Treasurer may require securities, such as United States, state, or municipal bonds, described in section 9, or a bond executed by a surety company, for which a form is prescribed and conditions specified. But as to the security that may be required of an active depository, no specification is made or bond provided for, or other requirement, except that it must be such United States, state, or municipal bonds, specified in section 9 as shall be approved by the Treasurer, and conditioned for the prompt collection of checks and drafts, for the safe-keeping of the money collected, and prompt payment thereof, on the Treasurer's order. These are very different conditions from those provided by section 5 for general depositories. It is not in the power of the Legislature to make provision for a loan or use of educational funds. Section 5, art. 8, of the Constitution of Oregon, provides, that "the Governor, Secretary of State and State Treasurer, shall constitute a Board of Commissioners for the sale of school and university lands, and for investment of funds arising therefrom." In the light of this constitutional provision we can have no doubt as to the intention of the Legislature in excluding educational funds from the operation of sections 1 to 5 of the act of 1907. The active depositories hold the money only as collections, and therefore the deposits were special, the title to which did not pass to the bank. Multnomah County v. Oregon National Bank (C. C.) 61 Fed. 912; State ex rel. v. Thum, 6 Idaho, 323, 55 Pac. 858; Sexton v. School Dist. No. 34 of Spokane County, 9 Wash. 6, 36 Pac. 1052; Merchants' Nat. Bank v. School Dist. No. 8, 94 Fed. 705, 36 C. C. A. 422.

Counsel for defendant cite Baker v. Williams' Banking Co., 42 Or. 213, 70 Pac. 711, as decisive of the rights of the Treasurer to make a general deposit of the educational fund, but the question involved here did not arise in that case, and could not, as we are now controlled by the statute of 1907. The character of deposits must be determined by this statute. Section 11 makes it a felony

for the Treasurer to remove or deposit the state money except for lawful payments "or for the purpose of depositing the same under the provisions of this act" in banks which shall have qualified as depositories, and this manner of deposit is exclusive. Both
89 the Treasurer and the Trust Company in June, 1907, recognized and acted under this statute by creating the active depository and segregating the educational funds. Nebraska has a statute similar to sections 1 to 5, inclusive, of this statute, but it does not except the educational funds, and in State v. Bartley, 39 Neb. 353, 58 N. W. 172, 23 L. R. A. 67, under a constitutional provision similar to ours, it is held that a deposit by the State Treasurer in such a depository is a loan, and that the statute is therefore void, in so far as it attempts to include educational funds. And in considering whether a deposit of the educational fund, under that law, might not be considered a deposit for safe-keeping, the court, referring to the contention of counsel for plaintiff to that effect, say: "This construction would be a reasonable and proper one, if the deposit contemplated by the statute was a special one, merely for safe-keeping, and that the same identical money should be returned. But this is not the kind of deposit the Legislature meant." Our statute has gone further, and provided how the educational fund shall be deposited by excepting it from the general deposit authorized by sections 1 to 5, and providing for the collection of checks and drafts, and the safe-keeping of money so collected, subject to the order of the Treasurer. This statute constitutes a part of the terms and conditions of the appointment of the depositories, and must be read into any arrangement made thereunder for deposits. State v. Bartley, 39 Neb. 353, 58 N. W. 172, 23 L. R. A. 67, 72. Merchants' Nat. Bank v. School Dist. No. 8, 94 Fed. 705, 36 C. C. A. 432, is very much in point upon this question, where it is said: "The bank had knowledge of the nature of the funds, and was chargeable with knowledge of the statute. * * * The bank undertook to receive the money as a trust fund for an express purpose, and for no other. It is immaterial that in the finding the deposit is designated a 'special deposit.' The true nature of the transaction is disclosed by the facts. The money was to be treated as the funds of the school district, and not as the funds of the bank, and, in the light of that understanding, it is clear that the bank had no right to commingle the money with other funds." Also State v. Thum, 6 Idaho, 323, 55 Pac. 858, is in point. It is there provided by statute that a deposit in a bank of state money, otherwise than on special deposit, shall be punished by imprisonment. It is held that this is authority to the Treasurer to make special deposits, and that upon such a deposit the bank had no authority to mingle or use the money so deposited.

Defendant further urges that the proof shows only a deposit and conversion of checks and drafts, and not money as charged in the indictment, and that this is a variance. The bill of exception shows that the Treasurer sent by mail to the Trust Company for collection checks and drafts. When these were paid by the banks on which they were drawn, the Trust Company thereby received the money for

the credit of the Treasurer, and it is immaterial how they were paid. There is no suggestion in the record that the Trust Company did not receive the money. On the contrary, upon the receipt of the check "No. 319, Geo. A. Steel, Treasurer, upon you $272,449.02," and check "No. 34, Geo. A. Steel, State Treasurer, on Ladd & Tilton, $2,600," the Trust Company opened an account on its books, entitled "Geo. A. Steel, Treasurer, Educational," and credited that account with a deposit of those amounts—$272,449.02. This is an acknowledgment that it received from itself and from Ladd & Tilton that amount of money for that account upon those checks. And the same is true of every other credit made, and constitutes at least prima facie proof of the receipt of the money. In State v. Neilon, 43 Or. 168, 73 Pac. 321, defendant was prosecuted under this statute for the conversion of state money. The proof was that he received checks and drafts. Mr. Justice Bean, in the opinion, says: "It is true that the bill of exceptions recites that there is no evidence as to what was done by the defendant with the checks and drafts; but, in the absence of a showing to the contrary, the jury were justified in finding that they were by the defendant converted into money on the presumption that the usual course of business was pursued. B. & C. Comp. § 788, subd. 26." Morse, on Banks and Banking, § 451, says: "A credit given for the amount of a check by the bank upon which it is drawn is equivalent to, and will be treated as, a payment of a check. It is the same as if the money had been paid over the counter on the check, and then immediately paid back again to the account." This language is quoted with approval in Bartley v. State, 53 Neb. 310, 338, 73 N. W. 744, 752, in a case where a similar question arose; and in Merchants' Nat. Bank v. School Dist. No. 8, 94 Fed. 705, 36 C. C. A. 432, the fund was held to be a trust fund and a special deposit, the title to which remained in the school district, though the deposit was made by checks, and the money not paid over the counter or segregated at the time, but placed to the credit of the district on the books of the bank. When the Trust Company placed to the credit of "Steel, Treasurer, Educational," the amount of a check, it thereby acknowledged that it had received the amount of the check in money, and is at least prima facie sufficient to establish the receipt of the money by the Trust Company. Having decided that the money in the hands of the Trust Company was a special deposit, and the money remained the property of the state of Oregon, and was paid out to other persons than the State Treasurer, it follows that this was a conversion of the money.

It is contended, however, by defendant, that the proof does not substantiate the charge in the information that defendants were in the possession of the money of the state, but only that it was in possession of the Trust Company, and that the officers were not personally liable. But the language of the information is "that the defendants on the 9th day of September, 1907, then and there pretending to act for and on behalf of the Title Guarantee & Trust Company, did then and there have in their possession and under their control, as officers and directors of said Title Guarantee & Trust Company, as aforesaid, $288,426.87." The Trust Company

is a corporation, an intangible thing, existing only in contemplation of law, a collection of individuals, authorized to act as if they were one. The individuals are its component parts, and the existence of a corporation independently of its stockholders is a fiction. Its rights and duties are the rights and duties of the persons composing it. 1 Morawetz on Corp. § 1; 3 Thomp. on Corp. § 4009; 7 Thomp. on Corp. § 8140. Thompson says it has the capacity of acting by the collective vote or will of its component members. It can do no act not authorized by its stockholders or directors, and then only within its charter powers. Its head and hands are the head and hands of its directors and officers, and while it acts lawfully within its corporate powers, the natural and individual capacity and responsibility of its directors and its officers as to all matters respecting the object of the incorporation is totally extinct, and what is done is only by and for the corporation; the directors and officers are not individually liable for its acts. There may be acts for which the corporation will be held criminally liable but not in any case in which intent is involved or where the punishment is more than a fine, because other punishment cannot be enforced. However, if the officers and directors of a corporation join in a criminal act, as a corporate act, they are jointly liable with the corporation, if it is an act for which the corporation may be prosecuted; and, if it is a felony, the directors and officers are individually liable. It is their criminal act, and not that of the corporation. 2 Morawetz, §§ 732, 733; People v. Clark (O. & T.) 14 N. Y. Supp. 642; People v. White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722. In the latter case the officers were jointly indicted with the corporation for violation of a municipal ordinance, and the Supreme Court say: "All the defendants were properly convicted. As officers of a company, they were jointly responsible for the business. It is not necessary to the conviction that they should be actually engaged in work upon the premises. The work is carried on by employés. The officers and directors are the persons responsible, and therefore the proper ones to be prosecuted." To the same effect is State v. Great Works Milling & Man. Co., 20 Me. 41, 37 Am. Dec. 38.

Defendant contends that section 1807, B. & C. Comp., is only intended to punish persons who are authorized by law to receive money for the state, or into whose hands it comes lawfully, and who convert it, and that Ross was not individually authorized to receive the money. Under the act of 1907 the Trust Company was made an active depository, and therefore authorized to receive it. This it could only do by the hands of its officers; and, if it was a violation of the statute for the Trust Company to convert the money, it was equally so for any one who did the act for it, or authorized it. The money came into the hands of these defendants, as officers of the Trust Company, lawfully, by virtue of this statute, and they cannot be permitted to say that what they did in violation of the statute was not their act, and that therefore they are not responsible. If the acts were done in the name of the corporation by the defendants then they were accessories, and aided and abetted, and are principals under B. & C. Comp. §§ 1324, 2153; 3 Thomp. on Corp. § 4114;

4 Thomp. on Corp. § 4996; 21 A. & E. Ency. 896; State v. Moran, 15 Or. 262, 14 Pac. 419; State v. Steeves, 29 Or. 85, 43 Pac. 947. Thompson on Corporations (volume 3, § 4014) says: "It is the duty of the directors and other officers of a corporation to preserve its property as a trust fund of which they are the guardians, and to administer it for the purposes of the trust." And at section 4113 he says: "In a moral sense they are the custodians of the funds committed to their care by the stockholders and the depositors." These two sections are only discussing their civil responsibility, but it indicates their relation to the funds, and we conclude that the directors and officers of the bank, who used or authorized the use of the money by the Trust Company, are guilty under this statute.

Counsel for defendant also urge that the evidence does not tend to establish a conversion of the money by defendant to his own use, namely, that it is not sufficient to show that the funds were converted for the benefit of the Trust Company, but must have been to the personal advantage of defendant. We do not so understand the law of conversion. The statute uses the expression "shall in any way convert to his own use any portion thereof." That is what we understand the term "conversion" to mean, when applied to a wrongful appropriation for which trover will lie, namely, assuming upon one's self the property and right to dispose of another's goods without authority. The cases of Mills v. State, 53 Neb. 263, 271, 73 N. W. 761, and State v. Foust, 114 N. C. 842, 19 S. E. 275, cited by defendant as making a distinction between conversion to one's own use and to the use of another, both intimate that the term quoted may not include a misappropriation. But the Nebraska statute includes both forms of expression "convert to his own use or to the use of another." Therefore it might be held that the Legislature meant to limit the meaning of the former. But both of these cases are decided upon the term "embezzled," and not upon the expression "convert to his own use." The opinions in some civil cases, in defining what constitutes conversion say that it is not necessary that the conversion be to the use of the converter. But the term "conversion," as used in law courts, means "conversion to one's own use." Johnson's Universal Cyc. says conversion in law has two meanings. "(2) In the law courts * * * conversion lies at the foundation of the common-law action of trover, which word is derived from the French word 'trouver'—to find. There is a legal fiction that the defendant found the plaintiff's property and converted it to his own use. The material part of the case is the conversion." 1 Chitty, Pleading, 145, says: "The action of trover or conversion was, in its origin, an action of trespass on the case for the recovery of damages against a person who had found goods and refused to deliver them on demand to the owner, but converted them to his own use." Lord Mansfield says: "In form it [trover] is a fiction; in substance it is a remedy to recover the value of personal chattels wrongfully converted by another to his own use." 1 Chitty, Pld. 146. In 3 Ency. Laws of Eng., 360, the same language is used in defining the origin and meaning of the term "'conversion,' namely, a conversion to one's own use and the averment of "finding," being

only a fiction, has been dropped, and the action is now known as "conversion."

We find no decision or text-book, nor is any cited by defendant, that attempts to define the meaning of the term "convert to his own use" when used in a criminal statute. Such conversion does not, in itself, constitute a crime. The definitions in the dictionaries and text-books relate to acts that constitute a conversion for which trover will lie. A conversion, in the ordinary sense of the word, may be accomplished by one lawfully in possession of goods of another, when the conversion is by authority and for the benefit of the owner, and this creates no liability. But when used in its legal sense, the conversion must be for one's own use. In Baldwin v. Cole, 6 Mod. *212, Lord Holt says: "What is a conversion but an assuming upon one's self the property and right of disposing of another's goods, and he that takes upon himself to detain another man's goods from him, without cause, takes upon himself the right of disposing of them." "An appropriation of, and dealing with, the property of another as if it were one's own, without right." Webster. Under the heading, "Appropriation to Convertor's Use" (2 Words & Phrases, 1564) it is said: "Any direct act of dominion, wrongfully exercised over one's property, in denial of his right or inconsistent with it, is a conversion"—citing many authorities. See 9 Bacon's Abr. 631. To the same effect is the definition given by Mr. Justice Lord in the opinion in Budd v. Multnomah St. Ry. Co., 12 Or. 271, 7 Pac. 99, 53 Am. Rep. 355. Fowler v. Hollins, 41 L. J. (1872) 277, is a leading English case on this subject, and the court, in the opinion, uses the word "convert" as the equivalent of "convert to his own use." See, also, a leading article in 13 Cent. Law J. 185, copied from Solicitor's Journal, London. West Jersey R. R. Co. v. Trenton Car Works Co., 32 N. J. Law, 517. The term "convert to his own use" is not descriptive of crime, but is used in criminal statutes as a legal term with a definite meaning, well understood, and is equivalent to the legal term "conversion," and this is the "conversion to his own use" of our criminal statute, which declares that such a conversion of state money, by one who has received it for the state, shall constitute larceny."

We have six criminal statutes that make conversion of personal property of another "to one's own use" a crime; and, if it be necessary for the state to prove that the conversion is for the personal advantage of the defendant, there would be a failure of justice in many cases. Every assuming by one person to dispose of the goods of another, without right, as if they were his own is a conversion to one's own use. This is not extending the statute by inference or construction, but giving to the words the technical meaning they bear in the law. Laverty v. Snethen, 68 N. Y., 522, 23 Am. Rep. 184, makes the distinction between conversion to the use of the owner and to one's own use, and says: "Trover may be maintained when the agent has wrongfully converted the property of his principal to his own use, and the fact of conversion may be made out by showing either a demand and refusal, or that the agent has, without necessity, sold or otherwise disposed of the property contrary to his

instructions. * * * If the agent parts with the property in a way or for a purpose not authorized, he is liable for a conversion." We understand from those authorities, and many others we have examined, that, in relation to trover, the term "conversion" necessarily means conversion to one's own use, and is fully accomplished by any exercise of a dominion over a chattel without the authority of the owner, whereby the true owner is deprived of the enjoyment of his chattel. And it is wholly immaterial whether the person so converting did it for his own personal advantage or not. See, also, State v. Omaha Nat. Bank, 59 Neb. 483, 81 N. W. 319.

One other question remains. Does the evidence tend to show that Ross, as a director or president, participated in, or was a party to, the conversion? "Officers, directors, and agents of a corporation, participating in a violation of law in the conduct of the company's business may be held criminally liable therefor." 21 Am. & Eng. Enc. 896. We think there can be no question of the correctness of this statement. It is equally true that an officer of a corporation is not criminally liable for the unlawful act of the corporation unless he participated in the wrongful act. In Rex v. Hays, 14 Ont. L. R. 201, it is said that, "in the absence of a statute to the contrary, an officer of a corporation cannot be punished criminally for the corporation's unlawful act or default, unless he participates therein as an aider, abettor, or accessory, even though the corporation's offense consists of the violation of a statute which imposes imprisonment as a penalty." There is a note to this case in 8 Am. & Eng. Ann. Cas. 383, in which the author says: "The question of the criminal liability of the officers of a corporation for its acts of nonfeasance seems seldom to have arisen. The weight of modern authority * * * is apparently as laid down in the reported case viz., that an officer of a corporation is not liable for an offense committed by the corporation, except where he has in some way participated in the illegal act as an aider, abettor, or accessory,—citing several cases to that effect. 3 Thompson on Corp. § 4114, citing People v. Clark (O. & T.) 14 N. Y. Supp. 642, is to the same effect. There is no evidence in this transcript tending to show that Ross actually paid out for the Trust Company any of its money, or expressly authorized any one to do so. There is no doubt that if the money had been embezzled from the Trust Company, or applied in any way not intended by the company, or not for its benefit, by any subordinate, then Ross could not be held criminally liable, unless he participated in such diversion thereof, but that is not this case. The record tends to show that the money was in the general deposit funds of the Trust Company, and was paid out in the usual way in payment of legitimate claims against the Trust Company; that is, in the manner contemplated and intended by the company, and those in direction of its affairs. The agents actually paying out the money had a right to understand that this was to be done; there being no segregation of the money or limitation on the use of it. The Trust Company could only become an active depository of this fund by authority of its officers and board of directors. When the money was received by the company as an active

depository, and its directors and officers permitted the money to become a part of the general deposit of the company, without restriction thereon, with knowledge that in so doing the money would be applied to the Trust Company's general uses, this was general authority to subordinates to pay it out in the usual course of the business, and these officers and directors are liable therefor. The evidence tends to show that the disposition of the money by the Trust Company was with their knowledge, consent, and acquiescence, and they thereby participated in its diversion. To this effect is 4 Thomp. on Corp. § 4996.

This disposes of the principal questions involved. There are some minor questions raised, namely:

Exception was taken to the admission of evidence relating to Ross' knowledge of the bill pending before the Legislature of 1907, which authorized the appointment of depositories. This evidence only tended to establish Ross' knowledge of the statute and its terms, and was not prejudicial.

Exception was taken to the admission in evidence of the demand made upon the trust company. This we think was competent and consistent with the charge in the information that defendants had the money in their control as officers and directors of the Trust Company, and a demand upon the Trust Company for which the defendants were acting was sufficient. However, a demand, in case of conversion, is only necessary in case the conversion is not otherwise made to appear. Here the conversion was disclosed by proof that the money was paid out on liabilities of the Trust Company.

The proof offered by defendant to show absence of criminal intent was immaterial, as it only tended to show that, after the money was converted, the Trust Company gave the Treasurer collateral security. Such security is contemplated in the act of 1907, and when given did not condone the wrongful act. The proof of loss through failure of the Oregon Trust & Savings Bank was incompetent, as the money—being a special deposit—should not have been involved in the dealings between the Trust Company and its creditors. Neither is criminal intent involved under this statute, as we have shown in defining a conversion. Such a conversion, when committed in violation of the terms of this statute (section 1807), constitute the offense, and no other intent need be shown.

Exception was also taken to remarks made by the district attorney and the judge, in presence of the jury, in permitting leading questions by the state to its own witness. When the district attorney was cautioned by the court not to cross-examine his own witness, he appealed to the court as follows: "I must invoke the rule in this case that the witness is an unwilling one"—to which the court replied, "I see that the witness is unwilling." Certainly the district attorney had a right to make such an appeal to the court if the conduct of the witness justified it, and any form of ruling by the court allowing the attorney's question would have meant the same to the jury, as the language used, and was not error.

Exception is also taken to the portion of the judgment that commits defendant to the county jail until the fine is paid, for the rea-

son that the same is cruel and unusual under the prohibition of the Constitution. Defendant was sentenced to five years in the penitentiary, to pay a fine of $576,853.74, and to be imprisoned in the county jail one day for every $2 of the fine, not exceeding 288,426 days. This is an unusually large fine, and the imprisonment is for life, for the nonpayment of the fine, and is a cruel and un-
93 usual punishment within the prohibition of the Constitution. State v. Miller, 75 N. C. 73; State v. Driver, 78 N. C. 423; Frese v. State, 23 Fla. 267, 2 South. 1; In re Yell, 107 Mich. 228, 65 N. W. 97; Southern Express Co. v. Walker, 92 Va. 59, 22 S. E. 809, 41 L. R. A. 436; State v. Whitaker, 48 La. An. 527, 19 South. 457, 35 L. R. A. 561.

There can be no question that a sentence may be excessive, even though within the maximum of the statute, but if excessive, it is within the power of the appellate court to enforce this provision of the Bill of Rights, and avoid the judgment so far as it is excessive. Mims v. State, 26 Minn., 494, 5 N. W. 369; Southern Express Co v. Walker, supra; Frese v. State, supra; State v. Butman, 15 La. An. 166. And the judgment and sentence of the lower court will be modified by reversing that part directing that "he be imprisoned in the county jail of Multnomah county, Or., until said fine is paid not exceeding 288,426 days." In all other respects the judgment is affirmed.

94 Be it remembered, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the City of Salem, on the first Monday, the 4th day of October, 1909:

Whereupon, on this Tuesday, the 19th day of October, 1909, the same being the seventh judicial day of said term, there were present:
Hon. Frank A. Moore, Chief Justice,
Hon. Robert Eakin, Associate Justice,
Hon. Thomas A. McBride, Associate Justice,
Hon. Woodson T. Slater, Associate Justice,
Hon. William R. King, Associate Justice, and
J. C. Moreland, Clerk,

when the following proceedings were had:

STATE OF OREGON, Respondent,
vs.
J. THORNBURN ROSS, Appellant; GEORGE H. HILL, T. T. BURKHART, JOHN E. AITCHISON, Defendants.

Appeal from Marion County.

This cause having, on the 29th day of July, 1909, been duly argued and submitted to the court upon and concerning all the questions arising upon the transcript and record, and then reserved for further consideration. And the court, having duly considered

all the said questions, as well as the suggestions made by counsel in their argument and briefs, finds that there is partial error as alleged.

It is therefore ordered and adjudged by the court that that portion of the sentence rendered and entered in this cause in the court below adjudging "that appellant be imprisoned in the county jail of Multnomah County, Oregon, until such fine is paid, not to exceed 288,426 days," be, and the same is, reversed and set aside, and that the remainder of the judgment of the court below, to-wit: "that the appellant be adjudged to pay a fine of $576,853.74, and be imprisoned in the penitentiary of the state of Oregon for the term of five years and that the state recover off and from the appellant its costs and disbursements," be, and the same is, in all things
95 affirmed. And it is further ordered that the state recover off and from the appellant its costs and disbursements in this court, taxed at $—.

And it is further ordered that this cause be remanded to the court below from which this appeal was taken, with directions to enter a judgment in accordance herewith.

96 In the Supreme Court of the State of Oregon.

(Endorsed:) "Filed Dec. 1, 1909. J. C. Moreland, Clerk, by Arthur S. Benson, Deputy."

STATE OF OREGON, Respondent,
v.
J. THORBURN ROSS, Appellant; GEORGE H. HILL, T. T. BURKHART, and JOHN E. AITCHISON, Defendants.

Appellant's Petition for Rehearing.

To the Honorable, the Justices of the above entitled court:

Appellant avers that the court in its opinion announced on the 19th day of October, 1909, has mistaken the law applicable to this cause, and prays the court that the opinion and the decision based thereon may be withdrawn and that a rehearing may be granted in this cause. In support of this, your petitioner's prayer, he craves consideration to the following matters:

Deposits General.

Deposits in banks are of two kinds, general and special. The former is the usual deposit, and the man on the street understands that a general deposit is meant whenever mention is made of a deposit in a bank. A special deposit usually consists of title
97 papers or specific personal property. The depositor of a special deposit is entitled to receive back the identical thing which he leaves with the bank. A general deposit, on the other hand, creates the relation of debtor and creditor, and the right of

the depositor is to receive back an equivalent for that which he deposits; not the identical coins, but a like sum of money. These elementary principles of law are familiar to the court and are set forth in the text-books cited on page 19 of our original brief:

Newmarket on Bank Deposits,
Morse on Banking, and
Bolles on Modern Law of Banking.

The first question discussed in the opinion of the court is the question of whether or not the deposits of the educational fund made by the State Treasurer with the Title Company were general deposits establishing the relation of debtor and creditor. The conclusion reached by the court on this branch of the case is essential to support the decision rendered, and in case we can show the court that this part of the decision is erroneous it is clear that we are entitled to a reversal of the cause.

The court holds that sections 6, 7 and 8 of the depository law of 1907 apply to the school fund and the conclusion with reference to the character of the deposits is based upon the construction placed by the court on this statute. The meat of the opinion on this branch of the case is found in the following sentences:

"Sections 6, 7 and 8 provide for active depositories, and apply equally to the general and educational funds. It is evidently not the purpose of these sections that the active depositories shall loan or be required to pay interest on funds deposited thereunder, as section 5 provides for the security that shall be taken from general depositories, and if the active depositories could loan funds deposited therein, under the provisions of sections 6, 7 and 8, the effect
98 would be to nullify the requirements of section 5 as to the character of the security to be given for the general deposits. The writer is unable to understand the purpose of the last clause of section 8, unless it is to give to the State the benefit of any deal that the treasurer might be able to make for compensation. But whatever the intention, it can not change the meaning of these sections.

"Thus it appears that deposits, if they may be called such, in the active depositories, as provided in section 6, are made for an entirely different purpose than those provided for in section 3, and are only for a special purpose; namely, for the collection of the checks and drafts transmitted by the treasurer, the safe keeping, and prompt payment of, the money upon the treasurer's order. For the security of funds of the general depositories, the State Treasurer may require securities such as the United States, state, or municipal bonds, described in section 9, or a bond executed by a surety company, for which a form is prescribed and conditions specified. But as to the security that may be required of an active depository, no specification is made or bond provided for, or other requirement except that it must be such United States, state or municipal bonds, specified in section 9, as shall be approved by the treasurer and conditioned for the prompt collection of checks and drafts, for the safe keeping of the money collected, and prompt pay-

ment thereof, on the treasurer's order. These are very different conditions from those provided by section 5 for general depositories."

The conclusion of the court would seem to be based chiefly on the fact that section 7, providing for the security to be given by the active depository, permits securities less specific and presumably less adequate to the protection of the State than those provided by section 5 applicable to general depositories. We think that this construction of the section in question by no means justifies the deduction that the deposits were special and not general. The character of the securities to be exacted is a legislative question and even though the court should be of the opinion that the legislature
99 had acted improvidently their mistake in this regard ought not to control in the interpretation of statutory provisions which we think we can show are perfectly plain. There are reasons why the legislature might have regarded it as unnecessary to deal so rigidly with the active depository as with the general depositories. The latter are and always will be numerous and will be scattered over the State. The State Treasurer cannot in the nature of things know so well about their condition or methods of doing business. There is but one active depository. The relations of the State Treasurer to this depository are such that he should have no difficulty in keeping posted as to its condition.

The fact is, however, that the statute is more specific in the requirements made on the active depository for security than in the requirements made on the general depositories. Section 5 of the act requires that the general depository shall give either surety bonds or the securities described in section 9. Either the surety bond or the securities are a complete compliance with the statutory requirements set forth in section 5.

Section 7, defining the security to be exacted from the active depository as interpreted by section 9 of the act and by the opinion in this case, requires for the protection of the State, United States bonds, bonds of the State of Oregon, bonds of the several counties, cities, villages, towns and school districts and warrants of the State and of the several counties thereof. Nothing else in the way of security is a compliance with section 7, as interpreted. All of these securities are available under section 5, and in addition thereto under section 5 of the general depository has the right to give bonds of surety companies. The security exacted from the active depository is, therefore, more specific than that exacted from the general depository. If sections 7 and 9 of the statute shall be obeyed, it is in the highest degree improbable that a case will ever arise in
100 which money will be lost to the State through the failure of an active depository. Section 9 provides that no securities shall be approved unless their market value shall equal their par or face value. The securities listed in section 9 are of such a character as to be worth their face under any and all circumstances. Bonds and mortgages often prove to be inadequately secured, but the obligations of the United States, the State of Oregon, and the several coun-

ties, cities, villages, towns and school districts of the State are reasonably certain to be paid in accordance with their terms.

Sections 6, 7 and 8 of the act of 1907 seem to us to offer within themselves the plainest sort of indication of the legislative intent. These sections read as follows:

SECTION 6. The State Treasurer may designate a bank or trust company in the City of Salem or a bank or trust company in the City of Portland as an active depository for the collection of any drafts, checks, certificates of deposit and coupons that may be received by him on account of any claim due the State.

SECTION 7. The bank or trust company, designated as such active depository, shall be required to give security to the State to be approved by the State Treasurer for the prompt collection of all drafts, checks, certificates of deposit, or coupons that may be delivered to such active depository by the State Treasurer for collection; also, for the safe keeping and prompt payment on the State Treasurer's order of the proceeds of all such collections; also, for the payment of all drafts that may be issued to said State Treasurer by such active depository.

SECTION 8. The State Treasurer, on receipt of any draft, check or certificate of deposit, on account of state dues, may place the same in such active depository for collection, and it shall be the duty of such active depository to collect the same without delay, without charge for its services for such collection, or for exchange, and to notify the State Treasurer when collected. The compensation to be paid by such active depository shall be fixed by the State Treasurer upon the best terms obtainable for the State.

101 We desire to call the attention of the court to the following circumstances, all significant of the intention of the legislature that the funds deposited with the active depository should be used by it and that the relation should be that of debtor with creditor:

I.

The word used in sections 6, 7 and 8 to describe the bank performing the services indicated is "depository." The presumption is strong that this word is used in the same sense and with the same signification as in other parts of the act.

Toedtemeier v. Clackamas County, 34 Oregon, 66.

This word is found in sections 2, 4, 5, 11, 13, 14 and 15. In all of these other sections it is plain that the legislature intended to describe a banking institution in which money had been deposited in the sense in which deposits are usually made in banks and with which the relation of debtor and creditor had been created.

II.

It is provided by the concluding clause of section 7 of the act that when a collection has been made by the active depository, it shall pay the State Treasurer by draft and security is exacted from it for the payment of all such drafts as may be issued by it. This clearly

contemplates that the relation between the parties is that of debtor and creditor. A draft is an evidence of debt. The language used by the legislature is not consistent with a construction of the act which requires the active depository to keep the funds separate and apart, holding them as a bailee or mere custodian. A custodian of specie has no right to use it in the purchase of a draft. This circumstance has been held by the Tennessee court to be significant of the creation of the relation of debtor and creditor.

102 Sayles v. Cox, 95 Tenn. 579; 32 S. W. 626, 627:

"The facts as found are, so far as necessary to be stated, that complainant is a resident of Connecticut, and sent to the First National Bank of Johnson City a note and mortgage on George and Wife, citizens of Washington County, inclosed in a letter in the following words: 'I inclose herewith note and trust deed and insurance policy in loan of Phebe S. Sayles to F. M. George and wife, also a release of the trust deed. The amount due on the note is $900.00, with interest to be added from February 2, 1894. Will you please notify Mr. George and wife that the papers have been sent you for collection, and, upon his paying to you the amount due, deliver to him the release, and forward draft to me for balance, less your fee. Very respectfully yours, Arthur G. Bell.' November 6, 1894, Mr. George delivered to the First National Bank a check drawn by the Magnetic Building & Loan Association on said bank for $1,000, which the president and acting cashier received, and an entry was made on the books of the bank, showing a collection of complainant's debt.

"We think the question involved in this case is fairly presented and adjudicated in the case of Aken v. Jones, 93 Tenn. 353, 27 S. W. 669, where the general rule is held to be that an indorsement for collection vests no title to the paper in the bank, etc., and it may be recovered in specie before collection made; but if the bank make collection before it makes an assignment, even though it be in fact insolvent, it simply becomes an ordinary contract debtor of the owner, and he cannot impress any trust character upon the proceeds; citing 1 Morse, Banks, 248.

"In the present case the direction is to 'forward draft to me for balance, less your fee,' which clearly implies that the bank, after collection, should retain its charges, and forward the balance in its own draft to the sender of the note."

The statute plainly contemplates that the active depository shall hold the funds for a time after the collection is complete. Section 7 requires the active depository to give security for the safe
103 keeping and prompt payment on the treasurer's order of the proceeds of such collections. Section 8 prescribes the duty of the depository, when the collection is complete, to notify the State Treasurer. The requirement is not that the proceeds shall be immediately remitted to the treasurer, but that they shall be remitted promptly on receipt of the order of the treasurer. We understand the law to be well settled that where the owner of a piece of negotiable paper leaves it with a bank for collection, title to the paper does not pass to the bank, and the paper and that into which it may

be converted for the purposes of collection, remain the property of the owned so long as the collection is in process; but when the collection is once complete and the proceeds are held by the bank for the owner, the relation of debtor and creditor is established. This principle of law is supported by the following authorities:

3 A. & E. Encyc. Law, 2d ed., page 819:

"Although a bank which has received paper for collection is, until the collection of the paper, the agent of the depositor, a different relation exists after the collection has been made. According to the established custom of banks, the proceeds of paper deposited for collection are mingled with the general funds of the collecting bank, and are used by it in the same manner as its other funds. The depositor thereupon becomes the creditor of the bank for the amounts so collected, and the debtor, the collecting bank, in consideration of the right to use the money, undertakes and is bound to refund it in whole or in part upon demand."

Morse on Banks & Banking, 248:

"After the collection has been made, the bank becomes a simple contract debtor for the amount * * *. If the party for whom the collection is made is a regular depositor, the sum will be properly placed to his credit upon his general deposit account, unless a peculiar usage or special instructions demand some different
104 course of dealing. If the party has no deposit account, the bank simply owes him the amount on demand."

Marine Bank v. Rushmore, 28 Ill. 463, 470:

"So far as the receipt of the certificates and their collection is concerned, the appellants were the agent of appellees, and there the agency terminated. When the money was collected, it was mixed up with the general funds of the bank. It then became a deposit by the appellees, and the relation of debtor and creditor arose. It was a general deposit to their credit, to be governed by the rules which obtain in ordinary cases of deposits of money with banking corporations."

"In either view, the relation of debtor and creditor subsisted. The bailment terminated when the certificates were collected, and the appellees were credited on the books of the bank with the proceeds, the bank mingling them with their own funds."

Tinkham & Co. v. Heyworth, 31 Ill. 519, 522:

"Were this action against an attorney, for not paying over money collected, we should not hesitate to hold that case would lie. We think it is different in the case of a bank. Different duties and different rights arise in the two cases. The bank receives no fee for its services, but only the use of the money until it shall be called for by the creditor, while the attorney is entitled to a direct reward, and has no right to use the money at all, but must pay it over to his client immediately, without demand. Money thus collected never

becomes the attorney's money; he has no right to make himself the debtor of the client by crediting him with the amount, while the bank may place the money in its vaults as its own, and credit the customer with the amount, and thereby become the debtor of the customer, the same as in case of an ordinary depositor, and this, whether the customer keeps an ordinary account with the bank or not. Such is the universal custom with banks, and if we may not take notice of this custom, it was abundantly proved on this trial."

"When this money was collected and placed to the credit of
105 the plaintiff, the only relation between the parties was that of debtor and creditor, and the form of the action should have conformed to that relation."

Union National Bank v. Citizens Bank, 153 Ind. 44; 54 N. E. 97-100:

"The usual and ordinary custom, by which banks are generally controlled in collecting paper, does not require them to hold the money collected separate and apart from their own funds, and remit the identical money collected. The collecting bank, generally speaking, in the absence of any arrangement to the contrary, becomes the owner of the money collected, and is under an obligation to pay or remit, not the very money received, but an amount of equal value; and, while a collecting bank, it is true, receives the paper or claim for collection as the agent of the holder, still, when the money is collected, and the proper credit given to such holder or owner, then, as a general rule, the relation of debtor and creditor is created between the parties, and the relation of trustee and cestui que trust does not arise. This seems to be the prevailing doctrine, and is well supported by the authorities."

Hallam v. Tillinghast, 19 Wash. 20, 27:

"Following the custom in such cases, the money, upon making a local collection even, would be placed with the general moneys of the bank, and this would follow as well from a single transaction as from many, and when the creditor should call for payment, the particular moneys would not be handed out to him, but he would be required to check against the general funds of the bank, or to return the certificate of deposit if one had been issued to him. He would be paid from the general fund in either event under such custom."

"In support of the general proposition that only the ordinary relationship of debtor and creditor is established by substantially the facts here, see Akin v. Jones, 93 Tenn. 353 (27 S. W. 669: 42 Am. St. Rep. 921); Bank of Commerce v. Russell, 2 Dill. 215; Anheuser-Busch Brewing Ass'n v. Clayton, 56 Fed. 759; Muhlenberg v. Northwest Loan & T. Co., 26 Or. 132 (38 Pac. 932); Tinkham v.
106 Heyworth, 31 Ill. 519; Illinois Trust & Sav. Bank v. First National Bank, 15 Fed. 858; Frelinghuysen v. Nugent, 36 Fed. 229; Philadelphia National Bank v. Dowd, 38 Fed. 172; City of Spokane v. First National Bank, 68 Fed. 982; Little v. Chadwick, 151 Mass. 109 (23 N. E. 1005)."

Akin v. Jones et al., 93 Tenn. 353; 27 S. W. 669, 671:

"The general rule on this subject is that an indorsement for collection vests no title to the paper in the bank, and, if the paper passes into the hands of the assignee after insolvency, the owner may recover it specifically, or, if the assignee collects the paper, the owner may recover the proceeds; but, if the bank makes the collection before the assignment, it simply becomes an ordinary contract debtor of the owner, and he cannot impress any trust upon the proceeds. 1 Morse, Banks, §248."

Marine Bank v. Fulton Bank, 2 Wall. 252, 256:

"The truth undoubtedly is, as stated in the second branch of the proposition, that both parties understood that, when the money was collected, plaintiff was to have credit with the defendant for the amount of the collection, and that defendant would use the money in his business. Thus the defendant was guilty of no wrong in using the money, because it had become its own. It was used by the bank in the same manner that it used the money deposited with it that day by city customers; and the relation between the two banks was the same as that between the Chicago bank and its city depositors. It would be a waste of argument to attempt to prove that this was a debtor and creditor relation.

"All deposits made with bankers may be divided into two classes; namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it for his own profit,
107 agrees to refund the same amount, or any part thereof, on demand. The case before us is not of the former class. It must be of the latter."

The rule announced in the foregoing authorities is recognized by the New York courts:

Briggs v. Central Bank, 89 N. Y. 182.
People v. City Bank, 93 N. Y. 582.
Gordon v. Rasines, 5 Misc. 192; 25 N. Y. Supp. 767.

Without quoting from further authorities, we cite:

Peters Shoe Co. v. Murray, 31 Tex. Civ. App. 259; 71 S. W. 977.
Reed Co. v. Canton Bank, 100 Md. 299; 59 Atlantic, 716.
First National Bank v. Davis, 114 N. C. 343; 19 S. E. 280.
Sayles v. Cox, 95 Tenn. 579; 32 S. W. 626.
Klepper v. Cox, 97 Tenn. 534; 37 S. W. 284.
Commercial Bank v. Armstrong, 148 U. S. 50, 58.
First National Bank v. Wilmington Co., 77 Fed. 401.
Franklin Bank v. Beal, 49 Fed. 606.

In the light of the law as declared by these highly respectable authorities, is it not clear that the legislature intended that the proceeds of collections when once made by the active depository, should be held by it in the manner in which deposits are ordinarily held by banks and with the relation subsisting between the bank and the State as that of debtor with creditor?

IV.

As previously noted in this petition, the active depository is required to furnish security to the State for the performance
108 of its duties as defined in sections 6, 7 and 8 of the statute. What banking corporation would assume this burden if it was obliged to keep the funds separate and apart from its banking funds? Is it probable that the legislature, acting as reasonable men, would expect that any banking institution could be found to assume this burden, unless it was to have the use of the funds until they were called for by the State Treasurer?

V.

Section 8 makes it the duty of the active depository "to collect without delay, without charge for its services for such collection, or for exchange."

It thus appears that the act lays upon the depository, not alone the burden of furnishing security, but also of doing its work without compensation. Is it probable that the legislature thought any banking institution would do this work without compensation, unless it was to have the use of the funds until such time as the State Treasurer should order some other disposition of them?

We are fortunate in being able to cite the court to the highest authority as to the significance of this circumstance:

Commercial Bank of Penn. v. Armstrong, 148 U. S. 50, 58:

"We also agree with the circuit court in its conclusions as to those moneys collected by sub-agents to whom the Fidelity was in debt, and which collections had been credited by the sub-agents upon the debts of the Fidelity to them, before its insolvency was disclosed, for there the moneys had practically passed into the hands of the Fidelity, the collection had been fully completed."

"The agreement was to collect at par, and remit the first, eleventh, and twenty-first of each month. Collections intermediate those dates were, by the custom of banks and the evident understanding of the parties, to be mingled with the general funds of the Fidelity
109 and used in its business. The fact that the intervals between the dates for remitting were brief is immaterial. The principle is the same as if the Fidelity was to remit only once every six months. It was the contemplation of the parties, and must be so adjudged according to the ordinary custom of banking, that these collections were not to be placed on special deposit and held until the day for remitting. The very fact that collections were to be made at

par shows that the compensation for the trouble and expense of collection was understood to be the temporary deposit of the funds thus collected, and the temporary use thereof by the Fidelity. The case of Marine Bank v. Fulton Bank, 2 Wall. 252, is in point."

"That reasoning is applicable here. Bearing in mind the custom of banks, it cannot be that the parties understood that the collections made by the Fidelity, during the intervals between the days of remitting, were to be made special deposits, but on the contrary, it is clear that they intended that the moneys thus received should pass into the general funds of the bank, and be used by it as other funds, and that when the day for remitting came, the remittance should be made out of such general funds."

VI.

The Statute not only lays these burdens upon the active depository, but it exacts compensation from the depository to the State. The closing sentence of section 8 is as follows:

"The compensation to be paid by such active depository shall be fixed by the State Treasurer upon the best terms obtainable for the State."

It is certainly not a fair construction of this language to assume that it means nothing more than that the State shall have the benefit of any deal which the Treasurer might make with the depository bank. The statute plainly exacts compensation from the depository and the duty is laid upon the State Treasurer to secure the best terms obtainable in the matter of compensation to the State. The fact that his compensation is exacted from the depository is of itself the clearest possible indication of the legislative intent that the depository should be permitted to use as banking funds the proceeds of these collections until the treasurer should ask for them.

Board of Com'rs v. Citizens' Bank, 67 Minn. 236; 69 N. W. 912, 913:

"But the relations of a bank to the county and to the funds deposited with it under this statute are entirely different. The relation between the bank and the county is that of depositor and creditor, the same as between it and any other depositor. The money deposited does not remain the property of the county, but becomes the property of the bank, which it has a right to lend or use in any other way it sees fit. This right is implied from the fact, if from nothing else, that the bank is to pay interest on the money."

This same principle is announced by the Missouri court in Henry County v. Salmon, 201 Mo. 136; 100 S. W. 20.

These six circumstances to which we have asked the attention of the court are all significant of the intention of the legislature in enacting the sections of the statute bearing upon the questions involved in this case. It is the province of this court to give effect to the legislative intention. It is elementary that for the purpose of determining this intention the statute as a whole should be considered and

that one portion of the statute will be looked to as a guide for the meaning of another portion. This principle has been recognized by this court repeatedly in its decisions.

Ex parte Ah Hoy, 23 Oregon, 89, 91.
Toedtemeier v. Clackamas County, 34 Oregon, 66.
Wong Sing v. Independence, 47 Oregon, 231, 236.

The legislature must be presumed to know something about business, something about human nature, and about the way
111 banking is carried on. Is it not to impute an absurdity to the legislature to assume that it required of the active depository that it should work for nothing, charge no exchange, assume the burden of securing the State in the manner prescribed by section 9 of the act for the faithful performance of its duties, and should in addition thereto pay a compensation to the State all for the purpose of acting as a bailee or custodian of the State's funds? What business man would regard such a contract as reasonable? Who would not resent as an insult to his intelligence the suggestion that he should enter into a contract of that character? A construction of the statute which leads to consequences of this character is contrary to the canons of construction and must be rejected.

Church of the Holy Trinity v. U. S., 143 U. S. 457:

This is a case in which the act of Congress forbidding the importation of laborers under contract was sought to be applied to a church contracting for the services of a foreign clergyman. While the case came within the letter of the statute, Mr. Justice Brewer, speaking for the unanimous court, held that to so interpret the statute would be to lead to an absurd conclusion. He declined to adopt the interpretation of the court below, and held that the court would not assume that Congress intended the absurdity which would follow from the construction invoked by the prosecution. The opinion is rich in citation of authorities and in illustrations of the varying circumstances under which the principles announced by the court had been applied.

U. S. v. Hogg et al., 112 Federal, 909, 912:

"To impute to the revisers an intent to prevent a sale under a levy made by virtue of a live execution simply because the levy was made upon the last day when it could be lawfully made
112 would be to assume that they entertained a most unreasonable and absurd purpose. Such consequences should not be regarded as within the legislative intention, if any more reasonable view can be taken of the provision. Touching the rule of interpretation applicable, Judge Evans, who tried this case below, very aptly said:

"'There are certain fundamental principles for the construction of statutes which seem to me to obviate a result which I think would, under the circumstances of this case, be such as was not contemplated by the legislature. (1) The general and well-recognized principle

is that the literal import of a statute should not be followed to an absurdity.'"

Tsoi Sim v. U. S., 116 Federal 920, 926:

A decision of the Circuit Court of Appeals for the Ninth Circuit. The opinion was written by Judge Hawley, who said:

"Conceding that, by applying the literal language of the statute, it might be held that she should be deported, yet is it not evident that such a construction would necessarily lead to absurd results without any benefit to the United States?

"Is it not manifest that Congress never intended by the passage of the law to have it apply to a case like the present? One of the cardinal rules as to the interpretation of statutes is that they should receive a sensible construction. In U. S. v. Kirby, 7 Wall. 482, 486, 19 L. Ed. 278, Mr. Justice Fields, in speaking for the court, said:

"'All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases, should prevail over its letter.'

"Applications of this rule have been made under a great variety of circumstances and conditions. Oates v. Bank, 100 U. S. 239, 244, 25 L. Ed. 580); Lau Ow Bew v. U. S., 144 U. S. 47, 113 59, 12 Sup. Ct. 517, 36 L. Ed. 340; Holy Trinity Church v. U. S., 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226; Lee Kan v. U. S., 10 C. C. A. 669, 62 Fed. 914, 918; U. S. v. Hogg, 50 C. C. A. 608, 112 Fed. 909, 912, and authorities there cited."

The Oregon court was recognized and applied this rule of construction.

State v. McGuire, 24 Oregon, 366, 378.

We have carefully examined the cases cited by the court in support of the conclusion reached in construing these sections of the statute. One of these cases is Multnomah County v. Oregon National Bank, 61 Fed. 912. Although this is a decision rendered in the Circuit Court of the United States for the District of Oregon, it cannot for this reason be regarded as a guide for the interpretation of sections 6, 7 and 8 of the act of 1907, because this act was passed many years after this case was decided. The question mooted in this case, was whether the mingling of funds destroyed the right of a cestui que trust to follow the fund of which he was the owner. It was assumed, rather than decided, that plaintiff was a cestui que trust and not a creditor. If this question can be said to be involved in Judge Bellinger's decision, the case is clearly overruled by:

Baker v. Williams & England Banking Co., 42 Oregon, 213.
State v. Thum, 6 Idaho, 323; 55 Pac. 858.
Merchants Bank v. School District, 94 Fed. 705.

In these cases there was express statutory prohibition of the general deposit of the fund in question. It has not been suggested that

there is such prohibition of the deposit of the fund in this case, unless the prohibition be found either in

(*a*) Section 5 of Article VIII of the Constitution,
(*b*) Section 1807 of the B. & C. Code,
(*c*) Section 11 of the act of 1907.

114 The constitutional provision above referred to and section 1807 of the Code were before this court for construction in Baker v. Williams & England Banking Co., 42 Or. 213, and the court squarely held that they did not prohibit the general deposit of the state school fund. What the constitution forbids is the loaning of the school fund except in a manner therein defined and by a board therein designated. A general deposit of a fund in a bank is not a loan. It is not so considered in popular parlance nor is it so considered by the courts. No ordinary business man considers that he has loaned his money when he has placed it on general deposit with his banker. It is true that the relation created is that of debtor and creditor and that the depositor has no right to the identical coins which he has left with the bank, but the bank is obligated under the law to pay an equivalent sum on demand, and the fund is therefore subject to the control of the depositor at all times. This is the view taken by the courts generally.

See authorities cited on page 21 of our original brief. This is the rule squarely announced by this court in the case of Baker v. Williams & England Banking Co. The language of Mr. Justice Bean in that case is:

"A mere deposit in a bank for safe keeping is not inhibited by this provision." (Sec. 1807 of the Code.)

He also says:

"A public officer may not loan, with or without interest, any part of the public funds in his possession without being guilty of a felony, but he is required to keep such funds safely and for that purpose may deposit them in a bank, provided they are at all times subject to his order and there is no fixed period during which he has no right to demand their return."

Unless a general deposit is a loan it is perfectly clear that the Oregon Constitution does not forbid it, and the foregoing authority squarely holds that a general deposit is not a loan.

115 It is clear that section 11 of the act of 1907 does not forbid those acts expressly authorized and contemplated by sections 6, 7 and 8 of the same act. If these latter sections authorize a general deposit with the active depository, there is nothing in the language of section 11 of the act to forbid it. Section 11 forbids:

"The removal by the State Treasurer of moneys out of his vault, or out of any legal depository, except for the payment of sums authorized by law to be paid, or for the purpose of depositing the same under the provisions of this act in banks which shall have qualified as depositories."

If sections 6, 7 and 8 contemplate a general deposit of the school fund with the active depository, then clearly such deposit is within the exception noted in section 11. Independent of this considera-

tion it is to be said that there is no evidence in this record of any money being taken out of the vaults of the treasurer, or out of any other depository bank for deposit with the Title Company and there are no facts in this record, therefore, which bring the case within the prohibitions of section 11.

The Idaho case and the Federal case last above cited are therefore distinguishable from the case at bar.

We submit that the citation of these cases on this point is reasoning in a circle. The question under consideration is that of the construction of sections 6, 7 and 8 of the act of 1907. We are concerned with the inquiry: Do these sections forbid the general deposit of the school fund with the active depository, or do they permit such deposit? The Idaho case and the Federal case were based on statutes which expressly forbade such deposit. It is manifest that they cannot be in point, unless the act of 1907 expressly forbids such general deposit, and that is the very question which is material here.

The remaining case cited by the court in this portion of the opinion is Sexton v. School District, 9 Wash. 5. This was an
116 action brought by a material man to recover the value of lumber used in the construction of a school house. We have been able to find nothing in the opinion of the Washington court bearing even remotely on the questions at issue here.

The law prior to the enactment of the act of 1907 permitted the deposit of the school fund by its lawful custodian. This was squarely decided in Baker v. Williams & England Banking Co., 42 Oregon, 213.

We think that we have shown that the act of 1907 did not destroy or impair this right, but that the reasonable construction of the language of the legislature is an affirmance of the right already adjudged to exist by the decision of this court in Baker v. Williams & England Banking Co. Some reference is made in the opinion of the court to the case of State v. Bartley, 53 Neb. 310. There are points involved in this decision as to which its authority may still be said to be unshaken, but on the question now under discussion this case has certainly been discredited if it has not been in fact overruled. See the discussion contained in our original brief pages 46 to 53, inclusive. We do not recall that we have ever seen worse confusion in judicial decision than that displayed by the Nebraska cases on this question. The truth is that a rule of law which forbids a public treasurer to make a general deposit in fulfillment of his duty to safely keep the public fund is a rule inapplicable to the conditions of modern business life and one under which business cannot be conducted. The Nebraska court found it so and was obliged to recede from the rule announced in its earlier decisions. The doctrine upon which State v. Bartley was built up has been repudiated in Nebraska and generally criticised elsewhere. The case of State v. Bartley was decided and reported when this court wrote the opinion in Baker v. Williams & England Banking Co. It is highly probable that the case of State v. Bartley was before this court for
117 consideration at that time, because Mr. Justice Bean cites another Nebraska case which is certainly out of harmony with

State v. Bartley. Notwithstanding this latter decision the Oregon court holds in Baker v. Williams & England Banking Co. that a general deposit of the educational fund may be lawfully and constitutionally made.

It is a strained and unsound interpretation of the act of 1907 to deny to the active depository the power to receive general deposits. It is a depository in every sense in which any bank can be a depository. The word does not mean one thing in one section and something different in another. The active depository has all of the burdens of the other depositories; it must secure and must compensate the State. In addition thereto it is charged under the law with the collection, without exchange or other compensation, of all drafts, checks, certificates of deposit and coupons which may be received by the State. This duty is not exacted of other depositories. The active depository is singled out of the total list of depositories and charged with this burden peculiar to itself. This does not deprive it of its character as a depository or of its authority as such to receive general deposits. It would be anomalous to single one depository out of many, charge it with duties and load it with burdens peculiar to itself and by the very legislation which imposes these burdens, deny it the rights and benefits accorded others of the class exempt from these burdens.

The court also refers to Section 5 of Article VIII of the Constitution and suggests, without deciding, that this section bars the right of the legislature to permit a general deposit of the school fund. This section was certainly involved in the case of Baker v. Williams & England Banking Co., 42 Oregon, 213, and the court there held that a general deposit of this fund was lawful and that the relation created thereby was that of debtor and creditor. The opinion
118 of the court at another point would seem to disclaim any intention to overrule Baker v. Williams & England Banking Co., and we think the court must have intended to be guided by this decision in the points covered by it. A brief consideration of the principles which are fundamental to all government by law will show the injustice of overruling a decision which has declared certain conduct to be lawful and not criminal. The earlier decision in every such case has become a part of the law of the State. Citizens have used it as a guide in governing their actions. A new decision overruling the earlier one and declaring that criminal which the former decision held to be lawful, perpetrates injustice identical with that of ex post facto legislation. These principles are elaborated in a number of decisions of the Federal Supreme Court; notably:

Gelpcke v. City of Dubuque, 1 Wallace, 175.
Muhlker v. New York Company, 197 U. S. 544.

The injustice of such a departure from the rule of stare decisis as would be involved in the overruling of Baker v. Williams & England Banking Co. has been recognized by this court:

State v. Clark, 9 Oregon, 466.

Section 1807 Inapplicable to Appellant.

In our several briefs we have earnestly contended that section 1807 does not apply to men in private life; that it was intended by the legislature to punish the crime of larceny when aggravated by the element of official malfeasance and abuse of trust. Our arguments to this effect are supported by numerous authorities which are not noticed in the opinion of the court, nor is our argument answered by the court. We assume from the reference made
119 to this question, that the court is in accord with our contention as to the proper interpretation of section 1807, although the opinion in this respect may not be perfectly clear. The court says, "Under the act of 1907 the Trust Company was made an active depository and therefore authorized to receive it (the money deposited)."

If it was intended by this portion of the opinion to adjudge that the Title Company became a State officer, the conclusion reached by the court is out of harmony with the rulings of the Missouri and Georgia courts.

Henry County v. Salmon, 201 Mo. 136; 100 S. W. 20.
Colquitt v. Simpson, 72 Georgia, 501.

In this latter case the court said:

"We do not regard these depositories * * * as public officers of the State, in the sense of that term as used in the Code, from section 148 to 171, inclusive. A bank can hardly be called an officer * * *. The truth is, these banks are mere depositories of public money * * *. They are paid no salary under the act of 1897, but the Governor is to make terms with them for the use of the State's money. They are to pay such interest as the Governor, by the most advantageous contracts he can make, may be able to secure from them. Public officers, the treasurer for instance, are prohibited from making interest or other profitable private use of public money by the Constitution. * * * It is clear, therefore, that they are not public officers. It follows that these depositories are instruments or agencies sui generis and sui juris."

Whatever the court may have intended to decide with reference to the relation of the Title Company to the State, such relation cannot suffice to uphold the conviction, if we are correct in our interpretation of section 1807.

There is nothing in the information which shows that the Title Company was an active depository under the act of 1907.
120 There is nothing in the information which brings this appellant within the purview of section 1807 properly interpreted. Very clearly, therefore, our demurrer to the information should have been sustained and our motion for arrest of judgment should have been allowed. The orders of the lower court in these two respects are not to be defended or upheld on the one ground announced in the opinion bearing in any way on the question which we have raised.

The statute of this State has expressly protected the right of the

citizen to be exempt from punishment except upon a conviction based upon an indictment stating facts sufficient to constitute a crime.

B. & C. Code, Sections 1357 and 1426.

The legislative declaration in this regard is as much a part of the law of Oregon as the statute upon which this prosecution is based. If it is the duty of the court to enforce the one, it is equally the duty of the court to enforce the other.

We think we have shown in our briefs that section 1807 of the Code applies only to public officers, or perhaps we should say, following the language of the opinion rendered in this cause, applies only to those authorized affirmatively by law to receive and hold public money. In charging a violation of this statute, it therefore becomes essential to show in the indictment or information the facts which make the right of the defendant to receive and hold the public money with the conversion of which he is charged. The information on which this prosecution is based does not show these facts and is plainly insufficient. The information is published in full on pages 117 to 119 of our original brief. There is nothing in the information to show that the Title Guarantee and Trust Company was the active depository of the State of Oregon, or that appellant or any of the other defendants in this case had any
121 relation whatever to the state treasury or any right under the law to receive public moneys. In other words, the information did not bring the acts of these defendants within the purview of section 1807. The question was raised in the lower court in the only two ways contemplated by the statute and our appeal brings here for review the orders of the lower court adjudging that the information was sufficient as against our attack. Unless we misunderstand the conclusion reached by the court as to the proper construction and interpretation of section 1807 of the Code, it is clear that we are entitled to a reversal of this clause under the law as the court has found it to be.

No principle of criminal law is more elementary than that the indictment or information "must be so drawn as to exclude any assumption that the indictment may be proved and the defendant still be innocent."

State v. Smith, 11 Oregon, 205, 207.
State v. Packard, 4 Oregon, 157.
State v. Perham, 4 Oregon, 188.
State v. Dougherty, 4 Oregon, 200.
State v. Mack, 20 Oregon, 234.
State v. Koshland, 25 Oregon, 178.

All of the above authorities hold that a conviction cannot be upheld unless every element constituting the crime is charged in the indictment or information. Especially is this true where, as in the case at bar, the defendant demurs to the indictment and moves in arrest of judgment on the ground of its insufficiency.

Possession of Fund.

The statute upon which the conviction is based as quoted in the opinion of the court, is as follows:

"SEC. 1807. If any person shall receive any money whatever for this State * * * or shall have in his possession any
122 money whatever belonging to such State * * * and shall in any way convert to his own use any portion thereof * * * such person shall be deemed guilty of larceny."

It is manifest that this statute applies only to two classes of persons—those who shall receive money for the State, and those who shall have in their possession money belonging to the State. The larceny of State money by persons not falling within either of these classes, however reprehensible and however criminal under other statutes, cannot constitute a violation of this statute. The court does not find that this appellant received any money for the State of Oregon. The opinion is based wholly on the conclusion that the appellant had in his possession money belonging to the State. The facts in the case bearing on this question as stated by the court preliminary to the opinion are as follows:

"Steel segregated the funds and accordingly wrote to the Trust Company as follows:

'State of Oregon,
Treasury Department.

SALEM, *June* 3, 1907.

The Title Guarantee and Trust Company, Portland, Oregon.

GENTLEMEN: I enclose herewith for credit of Geo. A. Steel, State Treasurer, Educational, the following checks:

No. 319, Geo. A. Steel, State Treasurer, on you	$272,449.02
No. 34, Geo. A. Steel, State Treasurer, on Ladd & Tilton	2,600.00
Total	$275,049.00

Yours very truly, GEO. A. STEEL,
State Treasurer.'

123 "Thereupon, on the 5th day of June, 1907, an account was opened on the books of the Trust Co. entitled, 'Geo A. Steel, Treasurer, Educational,' the first item of which was the credit of the above amount, and thereafter, prior to Nov. 6, 1907, the time of the appointment of the receiver for the Trust Co., many other credit were made in that account for checks sent by Steel for deposit therein, and on that day the balance to the credit of that account was $288,426.87. The remittances were all made in checks and drafts, except as above mentioned, and, except as stated, there was no evidence of possession of the money by defendants."

We most earnestly contend that these facts as stated by the court fail to make out this element in the offense. The portion of the opinion bearing on this question is as follows:

"It is contended, however, by defendant, that the proof does not substantiate the charge in the information, that defendants were in the possession of the money of the State, but only that it was in possession of the Trust Co., and that the officers were not personally liable. But the language of the information is 'that the defendants on the 9th day of Sept., 1907, then and there pretending to act for and on behalf of the Title Guarantee and Trust Company did then and there have in their possession and under their control, as officers and directors of said Title Guarantee and Trust Company, as aforesaid, $288,426.87.'

"The Trust Company is a corporation, an intangible thing, existing only in contemplation of law; a collection of individuals, authorized to act as if they were one; the individuals, are its component parts and the existence of a corporation independently of its stockholders is a fiction. Its rights and duties are the rights and duties of the persons composing it. 1 Morawetz on Corp., Sec. 1; 3 Thomp. on Corp., Sec. 4009; 7 Thomp. on Corp., Sec. 8140. Thompson says it has the capacity of acting by the collective vote or will of its component members. It can do no act not authorized by its stockholders or directors, and then only within its charter powers. Its head and hands are the head and hands of its directors and officers, and while it acts lawfully within its cor-
124 porate powers, the natural and individual capacity and responsibility of its directors and its officers, as to all matters respecting the object of the incorporation, is totally extinct, and what is done is only by and for the corporation, the directors and officers are not individually liable for its acts. There may be acts for which the corporation will be held criminally liable, but not in any case in which intent is involved or where the punishment is more than a fine, because other punishment can not be enforced. However, if the officers and directors of a corporation join in a criminal act, as a corporate act, they are jointly liable with the corporation if it is an act for which the corporation may be prosecuted, and if it is a felony the directors and officers are individually liable. It is their criminal act and not that of the corporation."

The considerations noted in the portion of the opinion quoted above do not logically lead to the conclusion that this appellant was in possession of the funds in question, nor does a careful examination of the authority cited in the opinion lead to that conclusion. The court cites 2 Morawetz, 732 and 733. These sections merely hold that a corporation cannot commit a crime involving malice as one of its ingredients, but that it can commit a crime in which malice is not one of the elements, such, for example, as the maintenance of a nuisance or the neglect of a duty imposed by statute. The court also cites:

State v. Great Works Milling Co., 20 Me. 41.

Here the court said:

"When a crime is committed under color of corporate authority the individuals acting in the business and not the corporation should be indicted."

This point is expressly admitted on page 97 of our original brief.

A party violating the criminal law of the State could not be permitted to shelter himself behind the plea that he was acting
125 for a corporation. An employee of a railroad company could not murder a tramp trespassing on the railway right of way and shelter himself behind orders from his corporate superiors directing him to keep trespassers off the railroad. But we fail to see how this line of authority has any bearing on the question which we are raising. The legislature prohibits a certain act when done by persons standing in a certain relation to the State. We say that this appellant did not sustain that relation to the State. He did not have the possession of state funds. To prove that the possession of state funds was in a corporation of which he was an officer does not bring him within the purview of section 1807.

The relations of the Title Guarantee & Trust Company with the State Treasurer as regards the educational fund had their inception in the letter of June 3, 1907, above quoted. This letter was addressed to the Title Guarantee & Trust Company and there is no evidence that it was ever seen by appellant. It appears from the 42nd and 43d pages of the transcript, that all of the other remittances made by the State Treasurer were made by letters addressed to the Title Guarantee & Trust Company. On the 43d page of the transcript these letters are described in some detail and at the conclusion of the recital we find this language:

"Except as aforesaid there was no evidence on the subject of the possession of the moneys referred to in the information."

Can remittances forwarded to a corporation in this manner be said to be in the possession of one or more members of its board of directors? This certainly is not the doctrine held by the courts whose decisions we have cited liberally in our brief, pages 93 to 97.

Nor is it the doctrine of the text-book writers.

126 4 Thompson's Commentaries on Corporations, 4898.

In this section we find the following language:

"Delivery to an officer or agent authorized to receive possession for the corporation is delivery to the corporation, provided the officer or agent receives on behalf of the corporation. Thus, the delivery of plats of a building, proposed to be insured, to the agent of an insurance company, is a delivery to the company. So where the officers of a bank have been in the practice of receiving special deposits—that is, money and other things to be deposited in the vaults of the bank for safe keeping, this, on a principle already discussed, is a delivery to the bank, and the corporation, and not the officers, will be considered as the depository."

Another case squarely in point is:

Foster et al. v. The Essex Bank, 17 Mass. 479, 497:

"Notwithstanding the act of incorporation gives no particular authority or power to receive special deposits; and although the verdict finds that there was no regulation or by-laws relative to such deposits, or any account of them required to be kept and laid before the directors or the company, or any practice of examining

them; yet as it is found that the bank, from the time of its incorporation, has received money and other valuable things in this way; and as the practice was known to the directors, and we think must be presumed to have been known to the company, as far as a corporation can be affected with knowledge; and as the building and vaults of the company were allowed to be used for this purpose, and their officers employed in receiving into custody the things deposited; the corporation must be considered the depository, and not the cashier or other officer, through whose particular agency commodities may have been received into the bank.

"No authorities are necessary to support this position. It rests upon common and familiar principles. The master and owner of a house or warehouse, allowing his servants or clerks to receive for custody the goods of another, and especially if the practice be general and unlimited, as in the case with banks in relation
127 to special deposits, will be considered the bailee of the goods so received, and will incur the duties and liabilities belonging to that relation."

We call the attention of the court to the authorities cited on pages 93-97 of our original brief. These authorities apply the law determining who is in possession of personal property when it is in the custody of a servant, officer or employee. If the opinion in this case holds that there is no distinction between the possession of a corporation and that of its directors, the opinion holds that these authorities do not correctly state the law. We submit that they are respectable both in their number and in the standing of the courts and authors cited. If it is designed to announce a different rule in this case, the effect must be to take Oregon out of the operation of a rule firmly established elsewhere. If this opinion is to be interpreted as holding that the possession of a corporation is the possession of its officers and directors, we think the precedent must inevitably prove embarrassing and difficult to follow.

If this opinion is not to be so interpreted, then clearly the court has not answered our contention and has not shown any reason for upholding this conviction as against this contention of appellant.

It would be competent for the legislature to bring within the purview of section 1807 officers of corporations having public money in their possession, but the legislature has not seen fit to do so. The penalties prescribed by this section of the statute are directed only to those who have public money in their possession or who receive public money. In this case, under the construction of the statute contended for by the State it may be that the Title Guarantee and Trust Company had money in its possession, but it cannot be said with truth that this appellant had public money in his possession.

"Penal statutes are not to be enlarged by implication or extended to cases not obviously within their words and purport."
128 Black on Interpretation of Laws, page 290.

"The purpose of the rule is to prevent acts from being brought within the scope of punishment because courts may suppose they fall within the spirit of the law although not within its terms. To

create offenses by mere construction is not only to entrap the unwary but to endanger the rights of citizens."

Black on Interpretation of Laws, pages 288 and 289.

There are distinctions and differences between the possession of a corporation and the possession of its officers and employees which are fundamental, well understood by the bar and the community and which cannot be set aside in this case without violating the rule of law announced above.

Nor is the position of the State strengthened by the contention that this appellant can be held as an accessory to the crime of the Title Guarantee and Trust Company in converting to its own use moneys belonging to the State. We do not dispute the principle of law declared by this court in

State v. Moran, 15 Oregon, 262; and
State v. Steeves, 29 Oregon, 85.

It is well settled that he who acts through another acts himself and is responsible for that other's actions. This is all that is announced in these two authorities.

If the elements in the crime were all brought home to appellant he could not shelter himself from the penalty on the ground that he used the hands of another to effect the larceny of state money. The authorities above cited sustain this proposition, but they do not tend to show that this appellant sustained the relation to the State which is contemplated by the statute and which is one of the elements in the offense with which he is charged.

The opinion also cites the case of People v. White Lead Works, 82 Michigán, 471. The defendants in this case were convicted of maintaining a public nuisance. The individuals responsible and the corporation through which they did business were jointly charged and convicted. It was held that the fact that the business was conducted in a corporate name did not protect the individuals from prosecution and punishment.

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All of the foregoing cases involve offenses which any one could commit. One does not need to sustain any particular relation in order to commit homicide, the offense charged in the Oregon cases, or in order to maintain a nuisance, the offense charged in the case from 82 Michigan. We are dealing with a statutory offense which can be committed only by those who have possession of state money. When a crime can be committed only by a certain class of persons or persons sustaining a particular relation, there is a respectable line of authority to the effect that the statute cannot be extended by inference or by the accessory doctrine so as to embrace within its penalties any who fall without the class named by the legislature. This is the doctrine of the Texas, Kentucky, and Tennessee courts.

Strong v. State, 19 Tex. Ct. Rep. 969; 105 S. W. 785, 786:

"By the definition of the statute under which appellant was convicted, it is necessary that the offending party be either the proprietor, the manager, or in some way have control of, or run, the

public gaming place. Unless he is so connected with it, he cannot be guilty. * * * The rule laid down in the Mitchell case was based upon the proposition that where the statute, by express terms, limits the punishment to certain classes, or for the doing of certain acts, that it is only those who are brought by the facts under such definition that are amenable. This, we think, is a sound rule, and supported by the authorities generally. Mr. Bishop says, in section 657 of his work on Criminal Law, that 'if the terms of a statute distinctly limit the penalty to persons who participate in
130 the act only in a certain way, these terms furnish the rule for the court. Or, if the expression is general, then, if the offense is of minor turpitude, and especially if the thing is only malum prohibitum, the courts, by construction, will limit its operation to these persons who are more particularly within the reason or the expressed words of the enactment.' * * * Looking at the terms of this law as they are very plainly expressed, it is evident the legislature intended to limit under this statute the punishment to those only who are either proprietor, manager, or in control of or who run a public gaming house. Upon another trial, if it should occur, the charge should so instruct the jury."

Mitchell v. State, 34 Tex. Cr. R. 311; 30 S. W. 810, 811:

"Appellant was convicted and fined in the sum of $200 for keeping a disorderly house. The indictment is in the usual form, and charges her with keeping said house as owner, lessee, and tenant. * * * The appellant submitted a special instruction, in substance, that she could not be convicted unless she was the owner, lessee, or tenant of the house. The court refused this charge because 'all persons are punishable who are guilty of acting together in the commission of an "offense," and because the appellant's charge "ignores this principle."' This charge was refused because of the provisions of article 74 of the Penal Code. The contention of appellant is that by the terms of the act of 1889 (page 33) no person can be guilty of keeping a disorderly house unless he be owner, lessee, or tenant of such house. This view of the matter is strengthened when the former law is looked to to ascertain the legislative intent. Prior to the latter or amended act, all persons who were guilty of keeping such houses were subjected to the prescribed punishment. In amending the law, it was provided that owners, lessees, and tenants only should be punished. * * * The court should have charged the principle enunciated in the requested instruction. The judgment is reversed, and the cause remanded."

131 Frey v. Commonwealth, 83 Ky. 190:

The statute declared it a crime for any woman to endeavor to conceal the birth of her illegitimate child. A man was indicted under this statute and sought to be held as an aider and abettor of the act of the woman. The indictment was held to be bad. The Kentucky statute is like that of Oregon in declaring accessories before the fact to be liable as principals. The court held that this

could not bring within the purview of a criminal statute persons who did not belong to the classes designated by the legislature and against whom penalties were denounced.

See, also:

Page v. State, 11 Lea. 202.

The foregoing authorities do not state the unanimous conclusion of the courts. There is also a respectable line of authority to the effect that offenses which can be committed only by those who sustain a certain relation may be made to apply under the accessory doctrine to those who aid and abet the commission of the crime by persons falling within the denominated class, but under the doctrine of these other authorities the charge must be explicit. The information must show that some one sustained the designated relation and that the defendant aided and abetted such person in the commission of the crime.

Bishop v. State, 118 Ga. 799; 45 S. E. 614:

"The only point argued in the brief is that one cannot be accessory where he could not have been the principal; that the offense defined in Pen. Code, 1895, § 188, can only be committed by officers or employees of a corporation, and, as Bishop was not connected with the bank, it was legally impossible for him to be guilty of embezzlement, or of conspiring, aiding, and abetting Matthews, the
132 president, in secreting, taking, and carrying away the property alleged to have been misappropriated.

"It is not alleged that Bishop was present at the time of the commission of the offense, nor was it necessary to denominate him an accessory; it being charged as a fact that he aided and assisted Matthews, the president, in procuring, secreting, and fraudulently taking and carrying away the money of the bank. This was sufficient, and the principal and accessory can be joined in the same count."

Shannon v. People, 5 Mich. 71.
People v. McKane, 143 N. Y. 455; 38 N. E. 950.
State v. Rowe, 104 Ia. 323; 73 N. W. 833.

This is the rule as announced in 1 Enc. L. & P. 251, the latest authority discussing the question.

There is nothing in the information on which this conviction is based which charges appellant with aiding and abetting in the commission of a crime by the Title Guarantee & Trust Company. It is nowhere alleged that the Title Guarantee & Trust Company was in lawful possession of moneys belonging to the State, nor is it alleged that the Title Guarantee & Trust Company converted any such funds to its own use and that appellant participated in such conversion. Without these allegations, under the rule announced in the foregoing authorities, the conviction cannot be upheld. The offense defined by the statute can be committed only by one class of persons. Whether the statute can be extended under the doctrine of principal and accessory to those not falling within the class defined is not

necessary to be determined. It is sufficient for our purposes to show that whether the rule announced by Texas, Kentucky, and Tennessee be followed, or that announced by Georgia, Michigan, New York and Iowa, in either event the conviction was wrong.

133 In the light of the foregoing authorities we contend that the court erred in giving the following instruction:
B. E., 31; Transcript, 69.

"If the defendant, as director of the Title Guarantee and Trust Company, or as an individual, aided or abetted in the act charged in the information he would be as much liable for it as if he were a principal, or the only one concerned, but as to whether the defendant aided or abetted in the act charged on the information is for you to determine from the evidence; but the defendant could not save himself from prosecution for a criminal act, if one was committed, by merely showing that he had acted as director of the Title Guarantee and Trust Company."

The case of People v. Clark, 14 N. Y. Sup. 642, cited by the court in the opinion is not in conflict with the authorities cited by us on the question now under discussion. The line of authority which we are relying on is approved by the New York court in that case, but the statute under which the defendant was convicted in the New York case is shown to be applicable not to a designated class, but to any one who commits the prohibited act, and the New York case is therefore taken out of the operation of the foregoing rule. This will appear particularly from the following language found in the opinion of the New York court at pages 653 and 654:

"The claim is made that the defendants cannot be held as chargeable with a misdemeanor created by the car-heating act, upon the ground that they aided or abetted, counseled, induced, caused or procured the commission thereof, under this indictment, for two reasons: First, that it was the plain intention of the legislature to limit the guilt for the violation of the act to those against whom the prohibition was expressly aimed, viz., the corporation or person operating the road; * * * In reference to the first ground above stated, if the construction of the act bore out the claim made by the defendants, such position would be well taken; because it is undoubtedly true that where it is the intention of the legislature,

134 to be gathered from the act, that in creating a new offense it intended to limit the guilt to those against whom the prohibition was expressly aimed, none others are liable. But the act exhibits no such intention. As already stated, the act makes it unlawful for any steam railroad to heat its passenger cars, etc. It prescribes a money penalty against any person or corporation who violates the act, limiting the money penalty to any person or corporation operating the railroad. But when it comes to declare the violation of the provisions of the act to be a misdemeanor, there is no limitation whatever. The language is general, and applies to every corporation or person coming within the scope of the act and the provisions of the penal law. Therefore it is clear that there was no intention to limit the criminal section of the act further than statutory construction requires that it should be limited."

Responsibility of Appellant.

This brings us to the question of the criminal responsibility of appellant for the acts complained of. The rule of law applicable to this question is correctly stated in the opinion of the court in the following language:

"In Rex v. Hays, 14 Ont. L. R. 201, it is said, that "in the absence of a statute to the contrary, an officer of a corporation cannot be punished criminally for the corporation's unlawful act or default, unless he participates therein as an aider, abettor, or accessory, even though the corporation's offense consists of the violation of a statute which imposes imprisonment as a penalty.

"There is a note to this case in 8 A. & E. A. C., 383, in which the author says: 'The question of the criminal liability of the officers of a corporation for its acts of nonfeasance seems seldom to have arisen. The weight of modern authority * * * is apparently as laid down in the reported case, viz: that an officer of a corporation is not liable for an offense committed by the corporation, except where he has in some way participated in the illegal act as an aider, abettor or accessory,' citing several cases to that effect. 3 Thompson on Corp., Sec. 4114, citing People v. Clarke, 14 N. Y. Supp. 642, is to the same effect."

135 There are many other authorities which bear out the rule of law above stated.

Wakeman v. Dalley, 51 N. Y. 27, 32:

Here the court said:

"He was simply a director, and as such attended some of the meetings of the board of directors. As he was a director, must we impute to him, for the purpose of charging him with fraud, a knowledge of all the affairs of the company? If the law requires this, then the position of a director in any large corporation like a railroad, or banking, or insurance company, is one of constant peril. * * * It has not been generally understood that such a responsibility rested upon the directors of corporations, and I know of no principle of law or rule of public policy which requires that it should."

Arthur v. Griswold, 55 N. Y. 400, 406:

"The mere fact of being a director and stockholder is not per se sufficient to hold a party liable for the frauds and misrepresentations of the active managers of a corporation. Some knowledge of and participation in the act claimed to be fraudulent must be brought home to the person charged."

See, also:

Mason v. Moore, 73 Ohio St. 275; 76 N. E. 932.
People v. England, 27 Hun. 139.

In this case the defendant was convicted of unlawfully publishing a lottery advertisement in the New York Sun. On review in the appellate court the opinion was in part as follows:

"The evidence tended to show that the newspaper, 'The Sun,' in which the advertisement of the lottery was printed, was published by a corporation duly organized and known as 'The Sun Printing and Publishing Association'; that its business was managed by a board of trustees; that the defendant was one of the stockholders of the corporation, and employed as its treasurer and purchasing agent,
and superintendent of its business affairs. * * * The
136 court * * * instructed the jury that if the advertisement was published by the corporation of which the defendant was a member, he was the publisher within the meaning of the statute.

"A conviction based upon this instruction cannot, we think, be sustained.

"If the corporation did the acts constituting the offense, it must have done them by the direction or permission of its officers, and by the personal act of some of its agents or servants. It seems reasonable that when the officer or servant of the corporation is held to answer criminaliter for the acts of the corporation, that he should be permitted to require that some evidence be given showing his connection with the acts constituting the offense. He, and not the corporation, stands indicted. To prove that the corporation did the acts does not per se prove that he did them; it must also be shown either that the corporation did them by his hand, act, direction or permission, which, of course, is direct proof of his own acts; or such circumstances must be shewn as to justify the conclusion, as a fact, that what the corporation did he did; in other words, the circumstantial evidence may show that the defendant actually and personally did the acts which constitute the offense."

A case very closely akin to the case at bar is

State v. Parsons, 12 Mo. App. 205, 208, 209.

The defendants in this case were convicted of refilling branded barrels with oil for the purpose of evading the inspection required by law. One of those convicted was the president of the corporation in the conduct of whose business the offense took place. The Missouri court said:

"But there was no evidence connecting Mr. Parsons with the offense, except the fact that he was president of the company, and that he was in the office part of the store at the time. * * * There was no direct evidence, and no evidence as to the general course of the business of the Parsons Oil Company, from which it could be fairly inferred that Mr. Parsons had any knowledge of the doing of this act; that he had authorized the doing of it, or, generally, the doing of any similar act or acts; no evidence, in
137 short, connecting him with the offense, beyond the mere fact that he was president of the corporation, and was in another part of the building at the time when it was done. In a criminal case, where a necessary element of the offense is guilty knowledge or unlawful intent, something more than this must be shown. Under a rule of evidence which would sustain the verdict against him in this case, innocent men might frequently be convicted and disgraced.

The president of a bank might be ruined by a crime committed by its cashier or teller, without having any connection with it, other than the fact that he was president of the bank, and was in his room in the bank at the time when the crime was committed."

This court cites in the opinion in this case, 21 A. & E. Ency., 2d ed., 896. On this page the principle is stated as follows:

"In order to hold an officer or agent criminally liable individually for an offense committed by the corporation, or by its officers or agents, it must be shown that he had some actual personal connection with the illegal act charged."

Let us apply the principles announced in the foregoing authorities to the record in this case. Fortunately the bill of exceptions is exceedingly clear. We quote from pages 47 to 50 of the transcript:

"The evidence on the subject of the knowledge of the defendant and the responsibility of the defendant in connection with the acts and omissions of the Title Guarantee and Trust Company was as follows: There was evidence offered and received as aforesaid to show the official connection of the defendant Ross with the Title Guarantee and Trust Company, and that the same was as above set forth. George A. Steel, a witness for the State, testified as follows:

"Q. 'State whether or not as State Treasurer you had dealings or business with the Title Guarantee and Trust Company, or with either or all of these defendants, in January, 1907, after you became State Treasurer.

"A. 'No one except the Title Guarantee and Trust Company. I had no business with the others.

138 "Q. 'What was the nature of that business?

"A. 'I deposited state funds there.

"Q. 'Did you have any correspondence with Mr. Ross with respect to the deposit?

"A. 'I don't think any further than with the bank; I don't remember corresponding with him about it; there might have been a personal correspondence with him, but I don't think so. The business affairs and transactions were principally done by my chief clerk.

"Q. 'Did you have any talk with Mr. Ross about depositing these funds?

"A. 'Nothing special that I know of about the school fund. Probably when the law took effect I may have talked with him about it, but I don't remember. The account was segregated.

"Q. 'Did you have any correspondence with Mr. Ross or with the bank about that?

"A. 'Nothing, only instructions.

"Q. 'Personal instructions?

"A. 'By letter from the office.

"Q. 'Did you have any arrangement or agreement with Mr. Burkhart or Mr. Ross, or Mr. Aitchison or Mr. Hill about the manner and arrangement by which these funds would be deposited in the bank?

"A. 'I did. I don't think that Mr. Ross knew at the time any

further than my instruction in the office; I probably spoke to him but I don't remember any conversation.

"Q. 'With whom did you deal?

"A. 'Whatever dealing personally would be with Ross or Burkhart.

"Q. 'With whom did you communicate about the deposit?

"A. 'Direct with the bank, I think; that is to say, a letter was written by Mr. Perkins, the deputy.

"Q. 'Do you mean to say that you addressed a letter to the Title Guarantee and Trust Company?

"A. 'Yes; I sent a check on this account to take it out of the one account and put it in the other.

"Q. 'You don't think you had any conversation with these defendants in January or thereafter?

"A. 'This would be in June, about the first of June that this account was opened.

139 "Q. 'Did you have any conversation with these defendants about this deposit?

"A. 'I had no detailed understanding and I certainly would not. Probably not incidental talk, but the educational account was opened there about the 13th of June and taken out of the other general account, and then I kept these two funds, the educational fund separate from the general fund.

"Q. 'You mean to be understood as saying that you immediately placed these deposits with the Title Guarantee and Trust Company without having any communication personally, or any writing with the defendant?

"A. 'I don't know that I had any such conversation. It is only fair to presume that I did tell him about it, but I don't remember about it or any details about it. I remember the account must have been transferred by my orders from the office.

"Q. 'I am now talking about the original arrangement by which you began making deposit with the bank.

"A. 'There was no special arrangement with them any more than with any other bank.

"Q. 'Was there with any other bank?

"A. 'No, sir; no arrangement with them specially.

"Q. 'You simply sent the money down there without saying a word about it?

"A. 'The money was in the bank and I continued those accounts just as they were when I took charge of the office.

"Q. 'Do you mean to say that you sent them money and never said anything about it?

"A. 'There was no question about the amount as I don't know of any special instructions about it, only to continue the account with the State, but those things I don't remember.

"Q. 'Did you in any communication with the defendant in this case, verbally or in writing notify them of the character of the fund, whether educational or otherwise?

"A. 'When I first opened the office?

"Q. 'At any time.

"A. 'No. If there was anything of that kind done it must have

been when the new law took effect, and I don't remember anything, but my record will show; but I don't remember that.'

140 "The evidence of the State showed that the Title Guarantee and Trust Company had seventy or eighty employees. All of the testimony with reference to the dealings of the State Treasurer with the Title Guarantee and Trust Company was admitted subject to the objection of the defendant and on the condition imposed by the court that the State must connect the defendant with these transactions. At the conclusion of the State's testimony the defendant moved to strike out all of the testimony introduced by the State on the ground that there had been no showing that the defendant on trial had participated in, was responsible for, or had knowledge of the said dealings with reference to the educational funds of the State. The motion of the defendant was denied by the court and the defendant was allowed an exception to the ruling of the court in denying the same."

Can it be contended that the testimony above set forth brings this case within the rule so clearly stated by this court in its opinion, a statement of the law which is fortified by the other authorities above noted? The court holds that it sufficiently appears that the money of the State was paid out by the Title Guarantee and Trust Company in liquidation of the obligations of this corporation. The ruling further is that this must be presumed to be done under the instructions of the board of directors and that as appellant was one of the board his responsibility must prima facie be assumed. This is all matter of inference and conjecture. There were five directors of the Title Guarantee and Trust Company (see transcript, page 39). To assume that mere membership in this board charges each director with criminal responsibility for everything that was done within the doors of the institution is to substitute conjecture for proof and to deprive this appellant of his presumption of innocence until his guilt has been made out beyond a reasonable doubt.

It was admitted in the oral argument by Honorable M. L. Pipes, counsel for the State, that there was nothing in this record,

141 except appellant's official connection with the Title Guarantee and Trust Company, to charge him with criminal responsibility for the acts complained of. This admission was nothing more than a candid statement by counsel of the condition of the record. This being the condition of the record as stated by the able counsel who represented the prosecution, and the law being as declared in the opinion in this case and in the authorities which we have cited, can anything be clearer than that the evidence was insufficient to charge appellant with criminal responsibility for the acts complained of?

Excessive Penalty.

The one error of the lower court which this court has manifested a willingness to correct is that growing out of the excessive penalty imposed on appellant. The court at the conclusion of the opinion in this case declares that the penalty imposed by the circuit court violated the constitutional rights of appellant, but the only relief

accorded is the elimination of imprisonment for the purpose of collecting the fine imposed. The court does not interfere with the fine or grant appellant any relief with reference to it. We have in our original brief and in other parts of this petition sufficiently discussed the acts with which appellant is charged, and we think it sufficiently appears that appellant acted under an honest belief that the law was as contended for by his counsel on this appeal and that the acts involved no moral turpitude. He assumed that the State Treasurer had the right to deposit the school funds in his bank. Appellant certainly did not treat these funds as his own property. There was no failure to give the State credit for the deposits as made, and if any fault can be laid at the door of appellant in connection with the matter, such fault must be predicated on the mingling of these school funds with the general funds
142 of the bank. We have elsewhere stated our contention that the record does not show the responsibility of appellant for such mingling, but waiving this question, it is certainly true that the acts complained of on the part of appellant were all due to a construction placed by him on the law, which his counsel still contends was a correct construction. Yet the penalty as modified by the opinion of this court subjects him to a fine of nearly $600,000.00 and imprisonment for five years in the penitentiary. This penalty is imposed in the face of the fact established by the record in this cause, and well known to the public, that not a dollar of state money has been lost by the transaction on which this prosecution is predicated. Clearly the court has not taken the action which the constitutional rights of appellant call for.

Section 16 of Article I of the Oregon Constitution is in part as follows:

"Excessive bail shall not be required nor excessive fines imposed. Cruel and unusual punishment shall not be inflicted, but all penalties shall be proportioned to the offenses."

We contend that the judgment from which we appeal, even as modified by the court, is obnoxious to this constitutional guaranty. The imprisonment is flagrantly disproportionate to any wrong doing which can be laid at the door of the appellant, and if the fine is not excessive we cannot imagine any case in which the court would be justified in declaring a fine excessive.

We have searched the books but have been unable to find any case where a fine of this size has been imposed by any court, and we have therefore been unable to find any case where an appellate court has been called upon to review a penalty equivalent to that involved in this case. But the constitutional provision quoted above certainly means something. Like all other constitutional
143 provisions it is binding both upon the legislature and upon the judiciary. If the court finds that an excessive fine has been imposed, under the paramount law of the State it is its duty to relieve from such fine. There will never be a clearer case for the performance of such duty and the exercise of such prerogative. The principles applicable to this question are set forth in the dissenting opinion in the case of:

O'Neil v. Vermont, 144 U. S. 323, 338, 340.

In this case penalties were imposed upon O'Neil by the court of Vermont for the unlawful sale of liquor. He sued out a writ of error to the Federal Supreme Court, and the majoritiy of that court were of the opinion that no Federal question was involved and that the Federal court was therefore powerless to relieve against these penalties. Justices Field, Brewer and Harlan dissented from this opinion, holding that there was a Federal question involved and declaring in emphatic terms the construction to be placed upon the constitutional guaranties against excessive fines and cruel and unusual punishments. We quote the following language from the opinion of Mr. Justice Field:

"The accusation describes only a single offense; yet, by the addition of the words 'at divers times,' that document is held to justify a trial and uphold a conviction for three hundred and seven distinct offenses, only one of which is set forth in the accusation, and that defectively, all the others being brought within it by the use of those words.

"The punishment imposed was one exceeding in severity, considering the offenses of which the defendant was convicted, anything which I have been able to find in the records of our courts for the present century. By the justice of the peace in Vermont, before whom the defendant was accused, he was convicted of four hundred and fifty-seven distinct offenses, and sentenced to pay to the treasurer of the State a fine of $9140 and the costs of prosecution taxed at $472.96, and be confined at hard labor in the house of
144 correction in the county of Rutland for one month, and, in case the fine and costs should not be paid on or before the expiration of this month's imprisonment, to be confined there at hard labor for the further term of twenty-eight thousand eight hundred and thirty-six days, to be computed from the expiration of the month's imprisonment. This was more than seventy-nine years for selling, furnishing and giving away, as alleged, intoxicating liquor, which took place in New York, to be delivered in Vermont.

"It was one which, in its severity, considering the offenses of which he was convicted, may justly be termed both unusual and cruel.

"That designation, it is true, is usually applied to punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs and the like, which are attended with acute pain and suffering. Such punishments were at one time inflicted in England, but they were rendered impossible by the Declaration of Rights, adopted by Parliament on the successful termination of the revolution of 1688, and subsequently confirmed in the Bill of Rights. It was there declared that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. From that period this doctrine has been the established law of England, intended as a perpetual security against the oppression of the subjects from any of those causes. It is embodied in the Eighth Amendment to the Constitution of the United States, and in the constitutions of several of the states.

"The inhibition is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged. The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted."

On this branch of the opinion Mr. Justice Harlan writes more briefly, but to the same effect.

Parks v. Railroad Co., 13 Lea. 1:

This was a case where a statute of Tennessee imposed a penalty of $100.00 for the failure to announce the stopping place
145 or station at which the train stops. A proceeding was brought against the railroad company, charging it with such failure in two hundred and forty different cases, and a penalty of $24,000.00 was imposed. The appellate court said:

"If the legislature had in the act before us in so many words authorized what the plaintiff has done * * * it would be difficult to sustain the constitutionality of the statute, for the effect would be the imposition of an excessive fine. Constitution, Article I, Section 16."

State ex rel. Garvey v. Whitaker, 48 Louisiana Annual, 527; 19 Southern, 457:

In this case a fine of $720.00 was imposed upon the defendants for what was described as seventy-two distinct violations of a municipal ordinance in regard to trespass. It appeared that the acts of the defendants alleged to constitute seventy-two distinct offenses were committed within one hour and forty minutes, and the court held that the imposition of seventy-two fines aggregating $720.00 was a violation of "the mandate of the organic law that excessive fines shall not be imposed." The opinion is well considered and the decision was rendered in a habeas corpus proceeding.

Porter v. Dawson Bridge Co., 157 Penn. St. 367; 27 Atl. 730:

This was a case somewhat like the Louisiana case in the endeavor to make many offenses out of one. The Pennsylvania court, speaking through Mr. Justice Green, reviews the authorities at considerable length and refuses to sustain penalties aggregating $5790.00. See, also:

Graham v. House Building Association, 52 S. W. 1011 (Tenn.).

The foregoing provision is not the only clause of the Oregon Constitution applicable to our present contention. Section 15 of Article I of the Constitution provides, that:

146 "Laws for the punishment of crime shall be founded on the principles of reformation and not of vindictive justice."

This clause of the constitution has been recently construed by a well-considered decision of this court.

State v. Walton, 50 Oregon, 142, 149, 150.

The sentence imposed upon appellant, including the colossal fine above referred to, is certainly an example of vindictive punishment. It is not to be defended on principles of reformation.

Our reflection on this branch of the case since the case was orally submitted, and more particularly since the publication of the opinion of this court, has led us strongly to doubt whether this statute can be enforced as to its penalties in this case against appellant without violating his constitutional rights. There may be cases where section 1807 can be constitutionally enforced, but in a case of this character where the fault of the appellant is limited to acting in good faith on a construction of the statute which this court in its wisdom may now declare to be erroneous the penalties of section 1807 are certainly disproportionate to the offense.

Section 1807 Repealed by Act of 1907.

The bill of exceptions clearly shows an effort and intent on the part of the State Treasurer to generally deposit with the Title Company the funds transmitted by his several letters. Any bank receiving letters of this kind, accompanied by checks and drafts, would assume that the sender desired to become a general depositor and would treat the transaction accordingly. Such must have been the effect of the acts of the State Treasurer unless the law forbade
147 the making of a general deposit, and by operation of law the acts referred to must therefore result in some different relation than that which would usually obtain. Both in our original briefs and in this petition we have contended that the law prior to the enactment of the act of 1907, permitted a general deposit of the state school fund. This is the fund which was involved in General Odell's claim in the case of Baker v. Williams & England Banking Company and the court squarely held that this fund might be generally deposited in pursuance of the obligation of its custodian to keep it safely. The language of Mr. Justice Bean in deciding that case, the facts of the case to which his language was applied and the authorities cited by him all preclude any misunderstanding on this subject.

If, however, the court shall be of the opinion that, notwithstanding this decision, the general deposit of the state school fund was unlawful prior to 1907 and that the attempt to so deposit the fund constituted a crime under section 1807 of the Code, we think it clear that by operation of the act of 1907 the law has been changed in this regard and the legislature has authorized such general deposit with the active depository. It is unnecessary for us to re-state at this point in our argument our contentions with reference to sections 6, 7 and 8 of the act of 1907. To impute to the legislature an intention to authorize by these sections merely a bailment of state funds, is to charge them with absurd conduct and to fail in the respect which is due to a co-ordinate branch of the government. The legislature plainly contemplated that after collections had been made by the active depository the fruits of such collections should remain with it

subject to the order of the State Treasurer and that in the interim this official was authorized to mingle these funds with the other funds of the bank. This plainly created the relation of debtor and creditor between the active depository and the State. If it was unlawful for the State Treasurer to create such relation prior to
148 1907, he was plainly given this right by the act of the legislature passed at that time. So far as the acts of the State Treasurer fall within the act of 1907, it is plain that this latter act must be his guide and our guide as to what is lawful, and that section 1807 of the Code, if in conflict with this latter act, must be deemed to be repealed pro tanto. Compliance by the State Treasurer with the mandates of the act of 1907 is enforced by penalties defined in sections 11 and 12 of the later act. It is significant that these penalties differ radically from those defined by section 1807 of the Code. The treasurer might well commit an act which would fall both within the definition of the offense denounced in section 1807 of the Code and also within the definition of the offenses condemned by sections 11 and 12 of the act of 1907. As to such offenses it is plain that the later act and the later penalties must apply and that section 1807 is repealed pro tanto. If this be the effect of the later legislation as regards the State Treasurer, much more should this effect be given to the act of 1907 in behalf of appellant, who is not, never has been and is not alleged to have been, a State official charged with any duties in connection with the State funds.

No Indictment to Support Charge.

During the pendency of this appeal, by direct vote of the people, the Constitution of the State of Oregon was amended as follows:

"Section 18 of Article VII of the Constitution of the State of Oregon shall be, and hereby is, amended to read as follows:

"'SECTION 18. The legislative assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors; and out of the whole number in attendance at the court, seven shall be chosen by lot as grand jurors, five of
149 whom must concur to find an indictment. No person shall be charged in any circuit court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this State, except upon indictment found by a grand jury. Provided, however, that any district attorney may file an amended indictment whenever an indictment has, by a ruling of the court, been held to be defective in form."

The prosecution in this case is not based on an indictment by the grand jury, but on an informaiton filed by the district attorney. It will be noted that the foregoing constitutional amendment contains no saving clause as to prosecutions then pending. The clear import of the amendment, we contend, is to take away the charge against appellant, for the language of the amendment is that no person shall be charged except upon indictment found by a grand jury. It is elementary that the charge in indictment or information is juris-

dictional and that a trial without the accusatory instrument provided by law is void.

Ex Parte Wilson, 114 U. S. 417 (29 L. Ed. 89).
Mackin v. U. S., 117 U. S. 348 (29 L. Ed. 909).
Ex Parte Bain, 121 U. S. 1 (30 L. Ed. 849).
Ex Parte Lange, 85 U. S. (18 Wall.) 163 (21 L. Ed. 872).
Ex Parte Parks, 93 U. S. 18 (23 L. Ed. 787).
Parkinson v. U[illegible]121 U. S. 281 (30 L. Ed. 959).
Ex Parte McClusky, 40 Fed. 71.
Ex Parte Brown, 40 Fed. 81.
United States v. Smith, 40 Fed. 755.
Finley v. Smith, 61 Ala. 201.
State v. Lawrence, 12 Or. 297.
22 Cyc. 171.
State v. Shortell, 93 Mo. 123.
State v. Kelm, 79 Mo. 515.
150 State v. Sebecca, 76 Mo. 55.
State v. Huddleston, 75 Mo. 667.
Lindsey v. State, 72 Ind. 39.
Butler v. State, 113 Ind. 5.
Gould v. People, 89 Ill. 216.
State v. Quigley, 13 N. J. L. 293.
Prewitt v. State, 34 S. W. 924.
Levy v. Wilson, 69 Cal. 105.
People v. Thurston, 5 Cal. 69.
Bruner v. Superior Court, 92 Cal. 239 (28 Pac. 341).
Terrill v. Santa Clara County, 60 Pac. 38.

It is also well settled that the repeal of a criminal statute without a saving clause as to pending prosecutions deprives the courts of jurisdiction to proceed with such prosecutions.

Taylor v. State, 7 Blackf. 93.
Hirschburg v. People, 6 Colo. 135.
Broughton v. Branch Bank, 17 Ala. 828.
Howard v. State, 5 Ind. 183.
Thompson v. Bassett, 5 Id. 535.
State v. Mason (Ind.) 8 N. E. 716.
Genkinger v. Commonwealth, 32 Pa. St. 99.
Anonymous, 1 Wash. C. C. 84.
United States v. Finlay, 1 Abb. C. C. 364.
People v. Tisdale, 57 Cal. 104.
Griffin v. State, 39 Ala. 541.
State v. Allaire, 14 Id. 435.
State v. Lackey, 2 Ind. 285.
State v. Lloyd, 2 Id. 659.
State v. Cress, 4 Jones 421.
Calkins v. State, 14 Ohio St. 222.
151 State v. Fletcher, 1 R. I. 193.
State v. Ingersoll, 17 Wis. 631.
Mayers v. State, 7 Ark. 68.
People v. Board of Police, 16 Abb. Pr. 473.
Thomas v. State, 3 Tex. App. 112.
Montgomery v. State, 2 Id. 618.

The repealing of an act conferring jurisdiction will divest jurisdiction as to pending causes unless there be a saving clause protecting such pending causes.

French v. State, 53 Miss. 651.
Ex Parte McArdle, 7 Wall. 506.
Insurance Co. v. Ritchie, 5 Wall. 541.
Ex Parte Yerger, 8 Wall. 85.
Railroad Co. v. Grant, 98 U. S. 398.
Sherman v. Grinnell, 123 U. S. 679.
In re Hall, 167 U. S. 723.
U. S. v. Kelly, 9th Circuit Court Appeals, 97 Fed. 460.

These principles are held by the courts to be applicable even in cases where the repeal has taken place during the pendency of an appeal.

Speckert v. Louisville, 78 Ky. 287.
Hartung v. People, 22 N. Y. 96.
State v. Wise, 66 N. C. 120.
Heald v. State, 36 Me. 62.
Keller v. State, 12 Md. 322.
State v. Cole, 2 McCord 1.
Commonwealth v. McDonough, 13 Allen 581.
State v. King, 12 La. Ann. 593.
Ex Parte McCardle, 7 Wall. 506.
Mouris v. The A. C. Brewer, 17 La. Ann. 82.
152 Tuton v. State, 4 Tex App. 472.
Hubbard v. State, 2 Id. 506.

It follows from these principles that there is no due process of law at present to support the enforcement of the sentence pronounced against appellant. The charge is jurisdictional. The amendment to the State Constitution effectuates the repeal of the information statute. The information upon which this prosecution is based, in the absence of a saving clause, is therefore dead, and an attempt to enforce the sentence against appellant is a deprivation of his liberty without due process of law. As a citizen of the United States he invokes the Fourteenth Amendment for his protection, and raises this question as a Federal question.

Reasonable Doubt.

Appellant is entitled to every reasonable doubt on the law of this case, as well as on its facts. This is the meaning of our Oregon statute, B. & C. Code, sections 1392 and 1409. This is also the language of the courts in construing criminal statutes.

Horner v. State, 1 Oregon, 267.
United States v. Hewitt, 11 Fed. 243, 245.
United States v. Comerford, 25 Fed. 902, 903.
United States v. Garretson, 42 Fed. 22, 25.
Harrison v. Vose, 9 How. 372, 378.

No principle of justice is more elementary than that the citizen is entitled to know in unambiguous terms the law which he is required to obey.

"Caligula wrote his laws in a very small character and hung them upon high pillars, the more effectually to ensnare the peo-
153 ple" (1 Blackstone, 46); and Caligula has been loathed by all liberty-loving peoples as an unjust tyrant.

So fundamental is this principle of natural justice that a prohibition against ex post facto laws has been inserted in the Federal Constitution and we suppose in every State Constitution as well. There is a presumption that every citizen knows the law, but if this presumption is to effectuate justice rather than oppression, the laws must be clearly expressed and no citizen must be ensnared into criminality by the construction of a statute which will carry it into fields not plainly comprehended by its terms.

An application of these principles to the facts of this case will make plain the injustice involved in upholding this conviction. Appellant knew that since January 2, 1899, the executive branch of the State government has assumed that it was lawful to generally deposit the school fund in banks (bill of exceptions 3, transcript 41); he finds that this court in Baker v. Williams & England Banking Company has approved of such deposit as lawful. He examines the act of 1907 for the purpose of ascertaining whether any change has taken place in the law. The sixteenth section of that act would seem to suggest that the law as regards the school fund has not been altered in any respect. If it has been altered in any respect the change has been in the direction of making clearer the right to generally deposit the school fund in such a bank as that with which appellant was connected. This at any rate is the conclusion which nine business men out of ten would reach from an examination of sections 6, 7 and 8 of the act in question. They would note from such examination that the active depository performs its services without compensation and without charge for exchange; that it secures the State by the deposit of bonds or warrants and that it pays a compensation to the
154 State besides. All of these provisions are difficult to understand except on the theory that the legislature intended to permit the general deposit of these funds and that the active depository was entitled to treat [illegible]s as bank funds in consideration of the burdens it assum[illegible] the compensation it paid. To construe the statute as forbidding such deposit is to make it a snare for the unwary and to punish appellant for doing that which he believed and had a right to believe was lawful.

We have discussed the question of reasonable doubt as applied particularly to this question, but it is equally applicable to the other questions discussed in this petition. The case is an important one, vitally so to appellant. If an injustice has been done him, as we think it has, this application for a rehearing is the last opportunity for its correction. If the court will consent to re-open the case, we think we can show that the judgment from which we appeal is erroneous. If the court will carefully consider the questions suggested

by this petition, we feel sure that the court will be led to the conclusion that justice demands the rehearing for which we pray.

WM. M. KAISER,
WALLACE McCAMANT,
Of Attorneys for Appellant.

155 In the Supreme Court of the State of Oregon.

STATE OF OREGON, Respondent,
v.
J. THORBURN ROSS, Appellant; GEORGE H. HILL, T. T. BURKHART, and JOHN E. AITCHISON, Defendants.

Appeal from the Circuit Court of Marion County.

Hon. George H. Burnett, Judge.

Argued and submitted July 29, 1909. See 104 Pac. 596.

Wallace McCamant, William P. Lord, and William M. Kaiser, Attorneys for Appellant.
George J. Cameron and Martin L. Pipes, Attorneys for Respondents.

Petition for Rehearing.

EAKIN, *J.:*

Judgment and Sentence Modified.

(Endorsed:) Filed Feb. 15, 1910, J. C. Moreland, Clerk of the Supreme Court.

156 EAKIN, *J.:*

A petition for rehearing has been filed in this case by counsel for defendant, another by Carey & Kerr, on the ground that they are employed in cases involving some of the same questions, and another by Joseph Simon and twenty other leading members of the bar, solely as amicus curia, on account of the public importance of the decision.

The ground upon which the motion is based is error of this court in the application of the law to this case as disclosed in the opinion and is principally a review of the questions discussed therein.

Counsel for defendant and Carey & Kerr insist that the act of 1907 has no application to the educational fund, and that the Treasurer has the right to make general deposits of that fund in any bank, as held in Baker v. Williams, independent of that act, while it is contended in the petition of Joseph Simon et al. that by sections 6, 7, and 8 of the late law, a general deposit of that fund in the active depository is authorized.

We have re-examined the questions involved, with the aid of the briefs submitted with these applications, and adhere to our fin

views. Sections 1 to 5, make provisions for deposits, clearly contemplating that the deposits shall be general and requiring the Treasurer to deposit all State funds, except the educational fund, in the general depositories. The collections made by the active depository upon checks and drafts for the general funds, can not be left there by the Treasurer, but must be transferred to the general depositories. This obligation is as binding on him as that he shall not retain the money in his office.

Instead of exempting the educational funds from the terms of the act, section 16 provides that the term "funds" as used in
157 the act, shall not include the educational funds and that nothing in the act shall be construed to deprive the State Land Board of power over this fund, thus indicating that it is to be governed by the provisions of the act, save where it is excepted therefrom, and sections 6, 7, and 8 seem to have special reference to the educational fund.

The decision in Baker v. Williams, 42 Or. 223, is not here questioned. No doubt the legislature had that decision in mind when it adopted the present law, seeking thereby to guard the educational fund by expressly excluding it from a general deposit. Section 6 is not uncertain as to what funds may be collected thereunder when it says that it is for the collection of any drafts, checks and certificates that may be received by the Treasurer "on account of any claim due the State."

Sections 3 and 4 fix the minimum rate of interest to be paid by the general depository, and provide that the rate agreed upon shall not be changed for a year, and shall be computed on daily balance and paid quarterly, and that the bank shall render an account the first of every month, showing daily balances. And the condition of the security given is that all of these things shall be done, while the security required under section 7 is conditioned only for the prompt collection, the safe keeping and the prompt payment on the Treasurer's orders of the proceeds of such collections and for the prompt payment of its own drafts. This does not include statements, nor contemplate interest.

The conclusion is unavoidable, that this act only contemplates general deposits of funds other than the educational, and for which interest shall be paid. It was evidently the purpose of the legislature, by these provisions, to take the educational fund out of
158 that custom or right of the Treasurer to make general deposits as recognized in Baker v. Williams, supra. The clause in section 8, to the effect that the compensation to be paid shall be fixed by the Treasurer, does not require him to exact a compensation as a condition for the deposit, nor is such requirement made a condition upon which the bank shall be appointed an active depository.

In the opinion we cited some cases holding that in case of a special deposit, the money may not be mingled by the bank with its own funds, yet we did not intend to decide that question, deeming it unnecessary since the conversion was proved independent of such commingling; but the fact that the bank does so mingle a special

deposit can not deprive the owner of his rights as such. Woodhouse v. Crandall, 197 Ill. 104.

It is not held in the opinion that the Trust Company or the defendants were officers of the State, but the act of 1907 authorizes their possession of State money for the State, and they come fully within the class of persons mentioned in §1807, B. & C. Comp., which includes more than State or municipal officers, viz., "any person who shall receive any money whatever for this State." When the Treasurer deposits the money, as directed by the act of 1907, his personal liability therefor is terminated, although it is still subject to his disposal. The depository does not receive the money for him, but for the State, that is, by express direction of the law and not at the option of the Treasurer. The Trust Company and defendants did receive this money for the State by special authorization, and are as clearly within the very words of the statute as the Treasurer would be.

Section 1805, B. & C. Comp., defining embezzlement, relates to the fraudulent conversion by an officer, agent, or clerk of
159 a private person or incorporation, and does not apply to one in possession of public money, and section 1807 relates especially to public moneys that are misappropriated.

This is not a case where some other officer converted the money and defendant is held responsible for that act, by reason of his relation to the bank. There is nothing in the record to disclose that any other officer wrongfully converted the money. The cashier, or teller, who paid out the money was not offender unless he was aware of the source from which the money came and the capacity in which it was held. The wrongful act was done by the officers and directors who made the arrangement to receive the special deposit and permitted it to be mingled with its general deposit without restriction upon its use. A depository is only created upon the bank's application in writing, accompanied by a sworn statement of the condition of the bank, which must be approved by the Treasurer. This can only be consummated through the board of directors. It is a contract, between the State and the bank, of which the statute is a part to the effect, among other things, that the educational fund is a special deposit and mingling it with its general funds without restriction is the wrongful act that resulted in the conversion. Judge Redfield, in a note to the case of United Society of Shakers v. Underwood, 13 Am. Law. Reg. (N. S.) 211, in which he criticises that decision, states the liability of the bank and its officers in case of a special deposit, and says:

"But, as said in Foster v. Essex Bank, supra (17 Mass. 479) it would be a breach of trust for the bank or any of its officers to open a package left on special deposit and whoever did or counseled such act would be responsible to the owner of such tort. And if
160 done by an officer of the bank for its use and benefit, there can be no doubt the bank would be responsible. * * * The books all show that such officers and servants are liable to the owner of such special deposits for their own wilful acts."

Such acts, resulting in the diversion of the money, constitute the conversion.

Defendant now, for the first time, questions the sufficiency of the indictment, in that it does not allege that the Trust Company was an active depository or that it sustained any official relation to the state. The allegation is in effect that the defendants, acting for the Trust Company, did then and there have in their possession, $288,426.87 which belonged to the State of Oregon, and was part of the educational funds of the State deposited for the State for safe keeping, to be returned by defendants to the State of Oregon. The general rule is that when the statute sets out what acts shall constitute the offense, it is generally sufficient in the indictment to charge the offense in the substantial words of the statute. This rule has its exception, which is that the elements of the crime sufficient to inform the defendant of the charge he is called upon to answer, should be set out. As defined in State v. Dougherty, 4 Or. 205, the indictment is sufficient if it contains such specification of acts and descriptive circumstances as will, upon its face, fix and determine the identity of the offense and enable the court by an inspection of the record alone to determine whether, admitting the truth of the specific acts charged, a thing has been done which is forbidden by law. The indictment, we think, fully complies with this requirement. There is nothing left doubtful as to the particular acts constituting the offense. It states that the money was part of the educational
161 fund of the State, placed in defendant's possession for the State for safe keeping, which shows a lawful possession and comes within the words of the Statute. State v. Lee, 17 Or. 488; State v. Sam, 14 Or. 347.

Defendant's counsel contend that the charge against defendant was made by information filed March 6, 1908, and not by indictment, and that by the amendment of §18, Art. VII of the Constitution at the June 1908 election, it is provided that no person shall be charged in any circuit court with the commission of any crime except upon indictment found by a grand jury; that such amendment operated to repeal §§1258 to 1264, which provides for trial upon information by the District Attorney, and there being no saving clause in the amendment to the constitution, the appellate court is, by the amendment, divested of jurisdiction. This question was before this court in State v. Ju Nun, 98 Pac. 513, in which it is held that the Constitutional amendment is only prospective and does not apply to pending cases, and we adhere to that view.

If, as contended by defendant, the provisions of sections 11 and 12 of the act of 1907 operate to repeal §1807, B. & C. Comp., so far as there is a conflict as to the penalty, yet they only relate to acts of the Treasurer and not to the depository, and §1807 is unaffected thereby so far as it relates to the offense charged in this information.

Counsel again call our attention to the excessiveness of the fine, viz: $576,853.74, and upon further consideration we believe that the fine is excessive within the contemplation of the constitutional provision quoted in the opinion. The fine and the imprisonment

for nonpayment thereof, adjudicated by the trial court, were
162 within the terms of the statute and in compliance with its direct command, but we are of the opinion that the fine being so great, it is apparently beyond the power of the defendant to pay it at this time or even during a life-time of effort, and is such a one as is inhibited by the constitution.

The judgment of the lower court will be modified by reversing that part thereof adjudging that defendant pay a fine of $576,853.74, and that he be imprisoned in the County jail of Multnomah County, Oregon, until said fine is paid, not exceeding 288,426 days. In all other respects, the judgment is affirmed.

163 KING, *J.* (Dissenting):

I concur in the holding by the majority, respecting the unconstitutionality of this fine and jail sentence imposed; but, after a careful re-examination of the able briefs, and arguments therein, of the respective counsel, including those on petition for rehearing, I am unable to agree with the conclusion announced, respecting the other, and decisive, points presented. I, accordingly, record my dissent therefrom.

164 Be it remembered, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the City of Salem, on the first Monday, the 4th day of October, 1909:

Whereupon, on this Tuesday, the 15th day of February, 1910, the same being the 45th judicial day of said term, there were present:

Hon. Frank A. Moore, Chief Justice,
Hon. Robert Eakin, Associate Justice,
Hon. Thomas A. McBride, Associate Justice,
Hon. Woodson T. Slater, Associate Justice,
Hon. William R. King, Associate Justice, and
J. C. Moreland, Clerk,

when the following proceedings were had:

STATE OF OREGON, Respondent,
vs.
J. THORBURN ROSS, Appellant; GEORGE H. HILL, T. T. BURKHART, and JOHN E. AITCHISON, Defendants.

Appeal from Marion County.

An opinion having been rendered in this cause on the 19th day of October, 1909, and judgment entered thereon, and a motion for rehearing having been filed by the appellant, and it appearing on said motion that said judgment ought to be modified, it is therefore ordered and adjudged by the court that said judgment entered

in this cause on the 19th day of October, 1909, be, and the same is, hereby set aside and the following entered in lieu thereof:

This cause having on the 29th day of July, 1909, been duly argued and submitted to the court upon and concerning all the questions arising upon the transcript and record, and then reserved for further consideration. And the court having duly considered all the said questions, as well as the suggestions made by counsel in their argument and briefs and in their briefs for rehearing in this cause, finds that there is partial error as alleged. It is therefore ordered and adjudged by the court that that portion of
165 the judgment and sentence rendered and entered in this cause in the court below, to-wit: "That he" (the appellant) "be, and he is hereby, fined in the sum of $576,853.74; that he be imprisoned in the county jail of Multnomah County, Oregon, until said fine is paid, not exceeding 288,426 days", be, and the same is, reversed and set aside, and that the remainder of the judgment of the court below to-wit: "That the defendant, J. Thorburn Ross, be imprisoned in the Oregon State Penitentiary for the term of five years, and that the State of Oregon recover off and from the defendant, J. Thorburn Ross, the costs and disbursements of this action taxed at $—," be, and the same is, in all things affirmed.

And it is further ordered that the state recover off and from the appellant its costs and disbursements in this court taxed at $—.

And it is further ordered that this cause be remanded to the court below from which this appeal was taken with directions to enter a judgment in accordance herewith.

165a In the Supreme Court of the State of Oregon.

STATE OF OREGON, Respondent,
vs.
J. THORBURN ROSS, Appellant; GEORGE H. HILL, JOHN E. AITCHISON, and T. T. BURKHART, Defendants.

This is to certify that in his petition for a rehearing appellant in the above entitled cause duly and in accordance with the rules and practice of this court, presented his contention that the enforcement of the judgment against him in the above cause denied his rights as a citizen under the 14th Amendment to the Federal Constitution and constituted an impairment of his liberty without due process of law. That this contention of appellant was based upon the Amendment to the Oregon Constitution adopted in June, 1906. That appellant contended that the adoption of this Amendment deprived the court of right to proceed to enforce the sentence of appellant which was based on information and not on indictment and entitled appellant to a reversal of the judgment. That the court entertained the application of appellant on this and other grounds for a rehearing of his appeal. That the court considered the Federal question thus presented and decided against the aforesaid right, privilege and immunity claimed under the 14th Amendment to

the Federal Constitution and specially set up, as aforesaid
165b in appellant's petition for a rehearing.

I do further certify that both on his original argument in presenting his appeal and in his argument for a rehearing, appellant contended that under the decisions of this court, and particularly under the decision in the case of Baker vs. Williams & England Banking Company, 42 Oregon, 213, it was the law that a deposit of the Educational Fund of the State created the relation of debtor and creditor between the Bank accepting such deposit and the State, and appellant contended that a ruling in this cause that the relation created by such deposit was that of bailee and bailor, impaired the obligation of a contract in violation of the principles declared in the Federal Constitution. That the aforesaid contention was duly considered by the court and denied by it, the court holding that the title to the Educational Fund did not pass by deposit in a bank.

I further certify that while an oral argument was not permitted on the petition of appellant for a rehearing, the petition was duly considered and entertained by the court, and upon such consideration the judgment previously declared was modified in that the defendant was relieved of the fine imposed upon him by the sentence of the lower court.

Witness my hand this 12 day of April, 1910.

(Signed) FRANK A. MOORE,
Chief Justice of Oregon.

165c STATE OF OREGON,
County of Marion, ss:

This is to certify, that at the date of the foregoing certificate Frank A. Moore was Chief Justice of the Supreme Court of the State of Oregon; that I am familiar with his signature and know the signature attached to the foregoing certificate to be genuine.

Witness my hand and the seal of the Supreme Court of the State of Oregon this 21st day of May, 1910.

(Signed) J. C. MORELAND,
Clerk Supreme Court, Salem, Oregon.

(Endorsed:) "Supreme Court of Oregon. State of Oregon, Respondent, vs. J. Thorburn Ross, Appellant. Certificate of Chief Justice as to raising Federal questions. Filed May 31, 1910, J. C. Moreland, Clerk of the Supreme Court."

166 SUPREME COURT,
State of Oregon, ss:

I, J. C. Moreland, Clerk of the said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of the State of Oregon, plaintiff, vs. J. Thorburn Ross, Defendant, and also of the opinion of the court rendered therein on the 19th of October, 1909, the judgment entered thereon, and also the petition for rehearing filed herein on the 1st day of December, 1909, and the opinion subsequently

rendered by this court on the 15th of February, 1910, and the judgment entered thereon on said date; also certificate of Chief Justice Moore as to raising Federal questions.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Salem, Oregon, this 31" day of May, 1910.

[Seal Supreme Court, State of Oregon. 1859. The Union.]

J. C. MORELAND,
Clerk of the Supreme Court of the State of Oregon.

187 Supreme Court of the United States, October Term, 1909.

STATE OF OREGON, Plaintiff in Error,
against
J. THORBURN ROSS, Defendant in Error.

Assignment of Errors.

Comes now J. Thorburn Ross, plaintiff-in-error above named, and respectfully avers and shows in connection with his petition for a writ of error herein from the Supreme Court of the United States to the Supreme Court of the State of Oregon, that in the record, proceedings, decision and final judgment of said Supreme Court of Oregon in the above entitled matter, there is manifest error in this, to wit:

First. The said Supreme Court of Oregon erred in holding that the amendment of section 18 of Article VII of the Constitution of the State of Oregon which became effective June 23, 1908, after the conviction of the plaintiff-in-error, did not operate to divest the court of jurisdiction to entertain and proceed further with the charge against the plaintiff-in-error of the commission of a crime defined and made punishable by the laws of the State, such charge being based wholly upon an unsworn information and in the absence of any indictment found by a grand jury, except to reverse and set aside the judgment of conviction based upon such unsworn information, and in not holding that any further prosecution of said charge would deprive the plaintiff-in-error of liberty without due process of law in conflict with section 1 of the Four-
188 teenth Article of Amendment to the Constitution of the United States.

Second. The said Supreme Court of Oregon erred in holding that the act of the Legislature of Oregon, taking effect May 26, 1907, being chapter 135 of the laws of 1907, page 248, as construed by it, did not constitute an ex post facto law and as such was not repugnant to section 10 of Article I of the Constitution of the United States.

Third. The said Supreme Court of Oregon erred in holding that the act of the Legislature of Oregon taking effect May 26, 1907, being chapter 135 of the laws of 1907, page 248, as construed by

it, did not impair the obligation of the contract of deposit theretofore entered into between the State of Oregon or its Treasurer and The Title Guarantee and Trust Company, of Portland, Oregon.

Fourth. The said Supreme Court of Oregon erred in holding that the court below did not commit reversible error in excluding the sworn testimony of Edward Hirsch, A. N. Bush, W. H. Odell, John Sutherland, and William T. Perkins, to the effect that it had been the custom for thirty years prior to the first of June, 1907, for the State Treasurer of Oregon to deposit all public funds, including the three educational funds involved in the proceeding, in banks in the form of general deposits subject to check, that the custom had been to segregate the funds in the custody of the Treasurer only on the books of the department, the banks in no case being advised of the nature of the funds deposited with them, and that this custom had been observed by the Clerk of the State Land Board as well as by the State Treasurer.

169 Fifth. The said Supreme Court of Oregon erred in ordering judgment to be entered and in entering judgment affirming the judgment of conviction of the plaintiff-in-error and the sentence of the trial court in so far as the same imposed imprisonment for five years in the Oregon State Penitentiary.

Wherefore the said J. Thorburn Ross prays that the judgment and decision aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he has lost by the action and because of the said judgment and decision.

New York April 26, 1910.

J. THORBURN ROSS,
Plaintiff in Error.

WILLIAM D. GUTHRIE,
44 Wall Street, New York, N. Y.
ANTHONY HIGGINS,
Ford Building, Wilmington, Delaware,
Attorneys for Plaintiff in Error.

170 [Endorsed:] Supreme Court of the United States, October Term, 1909. State of Oregon, Plaintiff-in-Error, against J. Thorburn Ross, Defendant-in-Error. Assignment of Errors. Filed May 26, 1910. J. C. Moreland, Clerk of the Supreme Court. William D. Guthrie, Anthony Higgins, of Counsel for Defendant-in-Error.

Due service of the within assignment of errors is admitted this 17th of May, 1910.

GEO. J. CAMERON,
District Attorney, 4th Judicial District of Oregon.

This 20" day of May, 1910.

A. M. CRAWFORD,
Attorney General of Oregon,
By I. H. V.

171 To the Honorable Joseph McKenna, Justice of the Supreme Court of the United States:

The petition of J. Thorburn Ross, who is a citizen of the United States, residing in the City of Portland, Multnomah County, in the State of Oregon, and by profession a lawyer and member of the bar of the State of Oregon, respectfully shows as follows:

I. That on the 4th day of October, A. D. 1909, the Supreme Court of the State of Oregon rendered a final judgment against your petitioner, in a certain cause wherein the State of Oregon was plaintiff and respondent, and your petitioner was defendant and appellant, affirming so much of the judgment against him as sentenced him to imprisonment for a period of five years in the Oregon State Penitentiary and awarded costs against him, as will appear by reference to the record and proceedings in said cause, and that said court is the highest court of said State in which a decision in said suit could be had.

II. That your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error, under section 709 of the Revised Statutes of United States, because said judgment gives effect to an ex post facto law and therefore is in violation of section 10 of Article I of said Constitution; because said judgment gives effect to a statute which impairs the obligation of a lawful contract and hence is in violation of the contract clause in section 10 of Article I of said Constitution; and because said judgment having been rendered after the amendment of June 23,
172 1908, to the Constitution of the State of Oregon became effective, was rendered by a court having no jurisdiction to render it and hence was totally void and of no effect, and consequently, your petitioner is now unlawfully deprived of his liberty in violation of section I of the Fourteenth Article of Amendment to the Constitution of the United States: all of which more fully appears in the Assignment of Errors and in the record and proceedings in said cause, of which certified copies are herewith submitted.

Wherefore your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States, and for a citation.

And your petitioner will ever pray, etc.

J. THORBURN ROSS,
Petitioner.
WILLIAM D. GUTHRIE,
44 Wall Street, New York.
ANTHONY HIGGINS,
Attorneys for Petitioner.

The writ of error and citation as prayed for in the foregoing petition are allowed this 3rd day of May, A. D. 1910.

Dated, Washington, D. C., this 3rd day of May, A. D. 1910.

JOSEPH McKENNA,
Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. J. Thorburn Ross against The State of Oregon. Petition for Writ of Error. Filed May 26, 1910. J. C. Moreland, Clerk of the Supreme Court.

173 Due service of the within petition for writ of error is admitted this 17th of May, 1910.

GEO. J. CAMERON,
District Attorney, 4th Judicial District of Oregon.

This 20 day of May, 1910.
A. M. CRAWFORD,
Attorney General of Oregon.
By I. H. V.

174 Know all men by these presents, That we, James Thorburn Ross, of Portland, Multnomah County, State of Oregon, as principal, and Fidelity and Deposit Company, of Maryland, as surety are held and firmly bound unto The State of Oregon, in the full sum of Five Hundred (500) dollars, to be paid to the said State of Oregon, its certain attorney, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators successors and assigns jointly and severally, by these presents. Sealed with our seals and dated this Fifth day of May, in the year of our Lord one thouand nine hundred and ten.

Whereas, lately at a session of the Supreme Court of Oregon in a suit depending in said court, between said James Thorburn Ross and said State of Oregon a final judgment was rendered against the said James Thorburn Ross and the said James Thorburn Ross having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Oregon, to A. M. Crawford, its Attorney General and to George J. Cameron, the District Attorney of its Fourth Judicial District citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date thereof.

Now, the condition of the above obligation is such, That if the said James Thorburn Ross shall prosecute his writ of error to effect, and answer all costs if he shall fail to make his plea good, then the above obligation to be void: else to remain in full force and virtue.

JAMES THORBURN ROSS. [SEAL.]
FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, [SEAL.]
By HUGH M. ALLWOOD, [SEAL.]
Attorney in Fact.

Sealed and delivered in presence of
JAMES C. HIGGINS.

Attest:
JAMES R. KINGSLEY, *Attorney.*

Approved:
JOSEPH McKENNA,
Associate Justice of the Supreme Court
of the United States.

(Endorsed:) Filed May 26, 1910. J. C. Moreland, Clerk of the Supreme Court.

175 In the Supreme Court of the State of Oregon.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, Defendant.

Order.

This matter coming on to be heard at Chambers upon the motion of Wm. P. Lord, one of the attorneys for Defendant, to fix the amount of bail and to act as supercedeas pending the decision of the United States Supreme Court on a writ of error to said Court, and it appearing to the Court that Hon. Justice McKenna of the United States Supreme Court having signed a Citation in said cause, and that Defendant intends to file a writ of error to the United States Supreme Court, and it further appearing to the Court by reason of the above named defendant being in quarantine owing to scarlet fever in his household, it would be inconvenient for said defendant to justify on bail before the Clerk of this Court, and it also appears that the Clerk of the United States District Court would be a convenient place for the said Defendant and his sureties to justify and it also appearing to the Court that the offense of which the Defendant is charged is bailable, by virtue of section 1496 of Bellinger & Cotton's Annotated Codes and Statutes of Oregon, and section 1107 of the United States Revised Statutes, and that the defendant has been pending an appeal to this Court from the Circuit Court of
176 Marion County, Oregon on the charge to which he now prosecutes a writ of error to the United States Supreme Court, out of custody on bail in the amount of Six Thousand Dollars.

Now therefore, The amount of bail for said Defendant to furnish pending the decision of the United States Supreme Court on the writ of error is hereby fixed in the amount of Six Thousand Dollars, and the sureties shall have the qualifications prescribed by section 1496 of Bellinger & Cotton's Annotated Codes and Statutes of Oregon, and the qualifications of said sureties shall be to the satisfaction of one of the Judges of the United States District Court for the Ninth Judicial District.

(Signed) FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

177 (Endorsed:) Certified copy of the order of the Supreme Court fixing amount of bail in case of State of Oregon, Plaintiff, v. J. Thorborn Ross, Defendant. Filed May 20, 1910. J. C. Moreland, Clerk. By Arthur S. Benson, Deputy.

178 In the Supreme Court of the State of Oregon.

STATE OF OREGON, Plaintiff,
vs.
J. THORBURN ROSS, Defendant.

Bond.

A judgment having been given on the 15th day of February 1910, whereby a sentence of imprisonment in the Oregon penitentiary for a period of five years was affirmed as against the above named defendant, and a writ of error having been sued out in the Supreme Court of the United States for the purpose of reviewing the said affirmance of the said judgment and said writ of error having been allowed by one of the Justices of the said court and the said defendant having been admitted to bail by the Supreme Court of the State of Oregon, by an order passed on the 20th day of May, 1910, we, John T. Ross of Astoria, Clatsop County, Oregon, by occupation a merchant, and A. A. Lindsley of Portland, Multnomah County, Oregon, and by occupation a lumberman, hereby undertake that the above named J. Thorburn Ross shall in all respects abide by and perform the orders and judgments of the Supreme Court of the United States upon said writ of error and if he fail to do so in any particular that we will pay to the State of Oregon the sum of Six Thousand ($6000.00) Dollars.

Witness our hands this 25th day of May, 1910.

(Signed) JOHN T. ROSS.
A. A. LINDSLEY.

179 STATE OF OREGON,
County of Multnomah, ss:

I, John T. Ross, and I, A. A. Lindsley, being duly and severally sworn, do depose and say, each for himself, that I am a resident and freeholder within the State of Oregon and am worth the sum of Six Thousand ($6000.00) Dollars, over and above all my just debts and property exempt from execution.

JOHN T. ROSS.
A. A. LINDSLEY.

Subscribed and sworn to before me this 25th day of May, 1910.

[SEAL.] A. M. CANNON,
Clerk of the District Court of the United States for the District of Oregon.

The above bond is approved.

R. S. BEAN,
Judge of the United States District Court for the District of Oregon in the Ninth Judicial Circuit.

Dated May 25th, 1910.

(Endorsed:) No. —. In the Supreme Court of the State of Oregon. State of Oregon Plaintiff v. J. Thorburn Ross, Defendant. Bond filed May 26, 1910. J. C. Moreland, Clerk of the Supreme Court.

180 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Oregon, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a cause which is in the said court before you, being the highest court of law of the State of Oregon, in which a decision could be had in said suit between the State of Oregon and J. Thorburn Ross, wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity; and wherein was drawn in question the construction of the Fourteenth Article of Amendment to the Constitution of the United States, and the decision was against the right, privilege or exemption specially set up and claimed under said Fourteenth Article of Amendment, a manifest error hath happened to the great damage of the said J. Thorburn Ross, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., within sixty days from the date hereof, in the said Supreme Court to
181 be then and there held, that the record and the proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 3rd day of May, in the year of our Lord 1910.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed:

JOSEPH McKENNA,
Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. J. Thorburn Ross against State of Oregon. Writ of Error. Filed May 26 1910 J. C. Moreland, Clerk of the Supreme Court.

182 Due and legal service of the within Writ of Error is hereby admitted this 24 day of May 1910.

A. M. CRAWFORD,
Attorney General.

183 SUPREME COURT, STATE OF OREGON, ss:

I, J. C. Moreland, Clerk of said court, do hereby certify that there was lodged with me as such clerk on May 26, 1910, in the matter of The State of Oregon, versus J. Thorburn Ross,

1, The Petition for Writ of Error
2, The Writ of Error
3, The Citation
4, The Assignment of Error
5, The Bond on Appeal

I further certify that on May 20, 1910, there was filed in my office an order by Chief Justice F. A. Moore of said court, fixing the amount of bail of defendant herein, pending the decision of the United State's Supreme Court, and on the 26th day of May 1910 there was filed in my office such Bail Bond duly approved.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Salem, Oregon, this 31st day of May 1910.

[Seal Supreme Court, State of Oregon. 1859. The Union.]

J. C. MORELAND,
Clerk of the Supreme Court of the State of Oregon.

184 UNITED STATES OF AMERICA, ss:

To the State of Oregon Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Oregon wherein J. Thorburn Ross is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph McKenna, Associate Justice of the Supreme Court of the United States, this third day of May, in the year of our Lord one thousand nine hundred and ten.

JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

Due service of the within citation is admitted this 17th day of May, 1910.

GEO. J. CAMERON,
District Attorney, 4th Judicial District of Oregon.

This 20 day of May, 1910.

A. M. CRAWFORD,
Attorney General for Oregon.
By I. H. V.

185 UNITED STATES OF AMERICA,
Supreme Court of Oregon, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof, I have hereunto set my hand and affixed the seal of said Supreme Court of Oregon, in the City of Salem, this 31st day of May 1910.

[Seal Supreme Court, State of Oregon. 1859. The Union.]

J. C. MORELAND,
Clerk of the Supreme Court of Oregon.

Costs of Case.

Costs of transcript $79.50 paid by J. Thorburn Ross.

J. C. MORELAND,
Clerk of the Supreme Court of Oregon.

Endorsed on cover: File No. 22,222. Oregon Supreme Court. Term No. 75. J. Thorburn Ross, plaintiff in error, vs. The State of Oregon. Filed June 10th, 1910. File No. 22,222.

Supreme Court of the United States,

OCTOBER TERM, 1912. No. 75.

Office Supreme Court, U.
FILED.
NOV 23 1912
JAMES H. McKENN

J. THORBURN ROSS, Plaintiff-in-error,

v.

THE STATE OF OREGON.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR.

NOVEMBER, 1912.

WILLIAM D. GUTHRIE,
WALLACE McCAMANT,
Of counsel for plaintiff-in-error.

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Supreme Court of the United States,

OCTOBER TERM, 1912. No. 75.

J. THORBURN ROSS, Plaintiff-in-error,

v.

THE STATE OF OREGON.

Error to the Supreme Court of the State of Oregon.

BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR.

The writ of error in the above-entitled cause was allowed by Mr. Justice McKenna, May 3rd, 1910, on the ground that the plaintiff-in-error had duly raised federal questions in the state court and that he was, therefore, entitled to have this court hear and determine them under section 709 of the Revised Statutes. These questions were alleged to arise under the clause of section 10 of Article I of the Constitution of the United States which provides that "no state shall . . . pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts," and under the clause of section 1 of the Fourteenth Article of Amendment providing that no state shall "deprive any person of life, liberty, or property, without due process of law." As a motion has been made to dismiss the writ of error on the ground that the court has no jurisdiction to entertain the cause, by reason of failure duly to raise federal questions in the state court, that point will be discussed at the outset.

The case presents for consideration a criminal prosecution instituted against the plaintiff-in-error upon an information and not upon indictment. He was charged with having committed a crime in September, 1907, by converting to his own use funds which had been deposited by the state treasurer of the State of Oregon with the Title Guarantee and Trust Company, an Oregon corporation engaged in banking, etc. (record pp. 2–3). He was the president and a director of this corporation, of which a receiver was appointed on November 6, 1907. There was no evidence or claim that he was personally responsible for the failure of the Trust Company, or had personally ever misappropriated a single dollar of state funds, and to quote the language of the learned court below, "there is no evidence in this transcript tending to show that Ross actually paid out for the Trust Company any of its money, or expressly authorized any one to do so" (p. 63). He was convicted solely upon the ground that the state deposits in question, amounting to $288,426.87, had been commingled by the Trust Company with its other banking funds and deposits, and that it had neglected or failed to keep on hand a sum sufficient in actual cash at all times to pay the amount due the state treasurer on demand, although the state treasurer had taken abundant security for more than double the face of the deposit (pp. 33–35), and had made no demand for payment before the plaintiff-in-error was deprived of his control over the Trust Company's assets and affairs by the appointment of a receiver. The plaintiff-in-error was made liable solely because of an arbitrary interpretation by the state court of a recent state statute which in no way or manner created any such

crime or prohibited any such acts as those for which he was convicted. Although innocent of any criminal intent and acting in good faith under the settled law of the State, the plaintiff-in-error was nevertheless convicted and condemned to "be imprisoned in the Oregon State Penitentiary for the term of five years," and to be "fined in the sum of $576,853.74," and "imprisoned in the County Jail of Multnomah County, Oregon, until said fine is paid not exceeding 288,426 days" (p. 20). In other words, he was condemned to imprisonment for 5 years in the state penitentiary and for 790 years in the county jail! On the original hearing of the appeal, the Supreme Court modified the judgment and reversed the sentence in so far as it condemned the accused to 790 years imprisonment in the county jail (pp. 65–66), but it left him condemned to pay the fine of $576,853.74. On the rehearing, however, the Supreme Court again modified the sentence on the ground that it was "of the opinion that the fine being so great, it is apparently beyond the power of the defendant to pay it at this time or even during a life-time of effort, and is such a one as is inhibited by the constitution" (pp. 108–109). This left in full force the sentence of imprisonment in the state penitentiary for the term of five years. Thereupon this writ of error was sued out under section 709 of the Revised Statutes.

Two federal questions and assignments of error (p. 111) are now urged, viz.:

1. That the ruling of the state court creating arbitrarily a new crime and declaring criminal an act which was innocent and lawful when done was an *ex post facto* law within the meaning of the Federal Constitution.

2. That pending the prosecution a constitutional amendment was duly adopted by the people of the State of Oregon, which operated to repeal the statute authorizing criminal prosecutions upon information instead of upon indictment and thereby deprived the court of jurisdiction to proceed further—jurisdiction being an essential element of due process of law under the Fourteenth Amendment.

These federal questions will be discussed under the following points:

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I.

FEDERAL QUESTIONS WERE DULY RAISED IN THE STATE COURT.

It appears from the record (pp. 80, 102, 103, 109) and from the certificate of the Chief Justice of the Supreme Court of Oregon (pp. 109–110) certifying that federal questions were raised by the plaintiff-in-error in his petition for rehearing in accordance with the rules and practice of the state court, that the court entertained the application, that it considered the federal questions, and that it denied the rights thus asserted. It is now the settled rule that, under such circumstances, an aggrieved party is entitled to a review by this court of the federal questions notwithstanding the fact that they were raised for the first time in the petition for a rehearing. It is

enough that the state court, in accordance with its rules of procedure, entertained the application for a rehearing and determined it adversely to the claim of federal rights. *McCorquodale* v. *State of Texas*, 211 U. S. 432, 437; *Forbes* v. *State Council of Virginia*, 216 U. S. 396, 399.

The State of Oregon admits (see its brief, pp. 98–99) that at least one federal question, i. e., due process of law under the Fourteenth Amendment, was raised (rec. p. 102), and that the state court entertained and decided it, and it, therefore, concedes that "that is sufficient to give this court the right to consider" the point. But it contends, however, that "the questions of the *ex post facto* law and the law impairing the obligation of a contract, were not specially set up or claimed in the state court, but were raised for the first time in the petition for writ of error in this court." This argument proceeds, perhaps, upon a confusion of the rules applicable to the three different classes of cases provided for in section 709 of the Revised Statutes. When the federal question arises from a violation of section 10 of Article I of the Constitution by reason of a law alleged to impair the obligation of contracts or to be *ex post facto* in its operation, it is not necessary that the federal right should have been specially set up or claimed in the state court. *Water Power Co.* v. *Street Railway Co.*, 172 U. S. 475, 485, 487, 488; *Harding* v. *Illinois*, 196 U. S. 78, 85. In the latter case, Mr. Justice Day, speaking for the court, said: "Under the second class it may be said to be the result of the rulings in this court that if the federal question appears in the record in the state court and was decided, or the decision thereof was necessarily involved

in the case, the fact that it was not specially set up will not preclude the right of review here."

If we examine the petition for rehearing in the state court, it will be seen that federal questions not only appear in the record but were necessarily involved, and that the point was made that the decision of the court operated as an *ex post facto* law. Thus, the petition states as follows (pp. 80 and 108):

> "A brief consideration of the principles which are fundamental to all government by law will show the injustice of overruling a decision which has declared certain conduct to be lawful and not criminal. The earlier decision in every such case has become a part of the law of the State. Citizens have used it as a guide in governing their actions. A new decision overruling the earlier one and declaring that criminal which the former decision held to be lawful, perpetrates injustice identical with that of *ex post facto* legislation. These principles are elaborated in a number of decisions of the Federal Supreme Court; notably: *Gelpcke* v. *City of Dubuque*, 1 Wallace, 175; *Muhlker* v. *New York Company*, 197 U. S. 544 . . . . . No principle of justice is more elementary than that the citizen is entitled to know in unambiguous terms the law which he is required to obey . . . . . So fundamental is this principle of natural justice that a prohibition against *ex post facto* laws has been inserted in the Federal Constitution and we suppose in every State Constitution as well."

The opinion of the court overruling this petition (pp. 104–5) and the judgment thereupon entered (pp. 108–9) show that the questions were necessarily involved in the decision and were considered by the court.

In addition to this evidence of the fact that federal questions were involved in the decision of the application for a rehearing, there is the certificate of the Chief Justice of

the State of Oregon confirming that fact as well as certifying that federal questions were also raised on the original argument of the appeal.[1] The certificate, in part, reads as follows (p. 110):

> "I do further certify that both on his original argument in presenting his appeal and in his argument for a rehearing, appellant contended that under the decisions of this court, and particularly under the decision in the case of *Baker* vs. *Williams & England Banking Company*, 42 Oregon, 213, it was the law that a deposit of the Educational Fund of the State created the relation of debtor and creditor between the Bank accepting such deposit and the State, and appellant contended that a ruling in this cause that the relation created by such deposit was that of bailee and bailor, impaired the obligation of a contract in violation of the principles declared in the Federal Constitution. That the aforesaid contention was duly considered by the court and denied by it, the court holding that the title to the Educational Fund did not pass by deposit in a bank."

Although this certificate does not contain the words "*ex post facto* law," there can be no doubt, in view of the above language quoted from the petition for rehearing, that this was the real point intended to be presented. It ought to be sufficient that the attention of the court was called, even though inartificially, to the particular constitutional provision which a party seeks to invoke. "The reasoning or argument by which that claim was attempted to be supported is immaterial and would differ in different minds" (Cullen, J., in *Beardsley* v. *N. Y., L. E. & W. R.R. Co.*, 162 N. Y. 230, 234). A law which makes a change in the rule applicable to contracts and thus in civil proceedings impairs the obligation of contracts, is in substance

[1] See as to effect of this certificate, *Yazoo & Mississippi Railroad Co.* v. *Adams*, 180 U. S. 41, 48.

and effect the equivalent of an *ex post facto* law in criminal proceedings. The essence of the contention below undoubtedly was that the decision of the court in creating a new crime and disregarding the ruling in *Baker* v. *Williams & England Banking Co.*, 42 Oregon 213, was in effect the equivalent of an *ex post facto* law, as it certainly was a law impairing the obligation of contracts. The plaintiff-in-error was being prosecuted for an alleged crime, and the substance of his contention in regard to contract rights was that, if the state court disregarded and overruled the prior case and by its decision established new rules of conduct and different contract rights and duties, thereby making an act criminal which was not such when done, the effect would be to change the existing contract obligation and thereby in substance and effect to pass an *ex post facto* law. Protection against the *ex post facto* effect of the ruling (which at the same time would impair the contract obligation) was really what was intended to be invoked and what must have been understood by adversary and court.

It is, therefore, submitted that the protection of the Federal Constitution was duly invoked by the plaintiff-in-error against the operation of an *ex post facto* law, as well as against the act of the State in depriving him of liberty without due process of law.

Moreover, the State of Oregon concedes, as stated above, that at least one federal question was duly raised. If this be so, the motion to dismiss on the ground of want of jurisdiction will hardly be granted. In *Blythe* v. *Hinckley*, 180 U. S. 333, the court held that it was a sufficient answer to such a motion that questions of a federal char-

acter had been duly raised, and that their merit or lack of merit should not be inquired into upon a motion to dismiss, however otherwise might be the rule when a motion to affirm was coupled with the motion to dismiss.

II.

THE DECISION OF A COURT MAY CONSTITUTE AN EX POST FACTO LAW.

The decision of the state court in the case at bar made criminal an act which when done was not criminal. This decision, transmuting an innocent act into a crime by recourse to a judicial decision, was in practical effect as much an *ex post facto* law within the spirit and intent of section 10 of Article I of the Constitution of the United States as any statute could be. The constitutional provision undoubtedly was intended to be universal in its operation. It was aimed at every form and method by which a State might attempt to punish a man criminally for doing an act which was not criminal when done; and it is in that spirit that it ought to be interpreted and enforced. Otherwise, this particular guaranty of personal liberty might be rendered almost worthless. As in so many other things, "the letter killeth, but the spirit giveth life." If a State could, under cover of an arbitrary interpretation of one of its statutes, punish as a crime an act which was clearly innocent when done, then, as Chief Justice Marshall said in *Brown* v. *Maryland*, 12 Wheat. 419, 444: "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing."

In the leading case of *Cummings* v. *The State of Missouri*, 4 Wall. 277, 319, 325, 329, the court said:

> "These are general propositions and involve principles of the highest moment. But it by no means follows that, under the form of creating a qualification or attaching a condition, the states can in effect inflict a punishment for a past act which was not punishable at the time it was committed. . . . The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding. . . . The provision of the Federal Constitution, intended to secure the liberty of the citizen, cannot be evaded by the form in which the power of the state is exerted. If this were not so, if that which cannot be accomplished by means looking directly to the end, can be accomplished by indirect means, the inhibition may be evaded at pleasure. No kind of oppression can be named, against which the framers of the Constitution intended to guard, which may not be effected."

It is, of course, recognized that theoretically the proper function of courts of justice is not to make or pass laws but only to interpret and apply statutes and the supposedly pre-existing and well-established principles of the common law. It is recognized also that mere error of a court in construing a penal statute or in applying the principles of the common law cannot constitute an *ex post facto* law within the prohibition of the Federal Constitution. But it is contended that where there is reasonably no room for construction and a court arbitrarily declares criminal and punishes by imprisonment an act which clearly was not criminal or punishable when done, under

cover of construing an unambiguous statute, this ruling may constitute an *ex post facto* law within the true meaning of the Federal Constitution because such construction is given the force of law by state authority and is, therefore, state action. In other words, it is contended that if a state court does exceed its theoretical function and by a decision promulgates a manifest piece of judicial legislation, the fact that such arbitrary action is veiled under the guise of interpretation or construction of a statute will not defeat or exclude the right, power and duty of this court to protect the individual aggrieved by such *ex post facto* judicial action.

It must surely be a self-evident proposition that a decision which arbitrarily announces a new penal rule of conduct and makes it applicable to past acts, under color of interpreting or construing a statute, may, in substance and effect, be just as violative of the spirit of the constitutional prohibition against *ex post facto* laws as any statute can be.[1] If a state decision declaring and enforcing a rule of conduct which did not exist before be not the passage of a state law within the true meaning of this clause of the Constitution, then the several States through their judicial and executive departments may now unrestrictedly adjudge men guilty of crime and punish them for acts innocent when done, by arbitrary edicts or decisions of their judicial or executive officers wholly disregarding or setting aside rules of law theretofore established and in reliance upon which persons have acted. It should be recalled that so far as the Federal Constitution is concerned, full judicial powers may at any time be vested in state executive officers not learned in the law, and that the separation of the judicial from the executive power is

[1] See *Kring* v. *Missouri*, 107 U. S. 221, 248.

no longer deemed essential to the form of republican government which is guaranteed to each State.[1]

The spirit and purpose of the constitutional prohibition against *ex post facto* laws are to shield the individual from being punished for acts which were innocent when done and which he then had no reasonable ground to apprehend could be held criminal. The cruelty and injustice of an *ex post facto* law is the same whether it be the result of a statute or a judgment. To the man punished for an innocent act, it can make no difference that it was transmuted into a crime by an *ex post facto* arbitrary interpretation of a statute on the part of a court instead of by an *ex post facto* statute. It was mainly because "case-law operates retrospectively, being created *pro re nata*, and applied to facts which are prior in date to the law itself" that Bentham so fiercely denounced as unjust "judge-made law."[2] As Circuit Judge Sanborn said in *Westinghouse Air Brake Co.* v. *Kansas City So. Ry. Co.*, 137 Fed. 26, 35: "An *ex post facto* change of the law by construction is as vicious as by legislation." And in *State* v. *O'Neil*, 147 Iowa 513, 531, Chief Justice Deemer of the Supreme Court of Iowa declared that—

> "An *ex post facto* law is one which makes an act innocent when done a crime. *State* v. *Squires*, 26 Iowa 340. Strictly speaking, perhaps, this refers only to laws passed by the legislature, but there is every reason for holding that it also applies to a change of judicial decisions."[3]

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[1] *Dreger* v. *Illinois*, 187 U. S. 71, 83–84; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226; *People ex rel. Steward* v. *Railroad Commissioners*, 160 N. Y. 202, 207. See also *Soliah* v. *Heskin*, 222 U. S. 523, 534.

[2] Salmond's Jurisprudence, 3rd ed., p. 134.

[3] See also interesting discussions in Salmond's Jurisprudence, 3rd ed., §§ 9 and 38, pp. 20 and 134; Taylor's Science of Jurisprudence, pp. 511–513; Holland's Elements of Jurisprudence, 10th ed., ch. iii, p. 74.

In *State* v. *Clark*, 9 Ore. 466, 470, Lord, C. J., speaking for the Oregon Supreme Court, said:

> "In our judgment this is decisive of the case before us, unless *Finly* v. *Page* [8 Ore. 46] is to be overruled. We imagine it would be difficult to find a case overruled to maintain a conviction. *Stare decisis* is the policy of the courts, and the principle upon which rests the authority of judicial decisions as precedents in subsequent litigation, and this doctrine ought not to be departed from, except when subsequent examination shows the case to have been decided contrary to principle."

And in Bishop's New Criminal Law, Vol. I., section 95, the author says:

> "When a statute forbids a thing not wrong in itself, one is in every view justified in doing it under circumstances which the highest courts of the State have held not to be within its restraints. Under such circumstances, to overrule the decisions, and punish a man for an act in itself innocent, and pronounced lawful by the tribunals, would be to inflict gross injustice; and, certainly unless in very special cases, it ought not to be done. Such overturning of established doctrine would be too much in the nature of *ex post facto* judicial legislation."

It would be going in the teeth of elementary doctrine and refusing to recognize what is known to all as matter of fact and common experience, if it be now asserted that a State may not make or enforce new law solely by action of its judicial tribunals. We would have to close our minds to the true nature of the common law system of jurisprudence in order to deny that our courts are constantly engaged in making laws and that such judicial legislation is not quite as effective and binding as a legislative enactment and may not be quite as oppressive and cruel as any *ex post facto* statute can possibly be.[1]

[1] See *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 371, 372, dissenting opinion by Mr. Justice Holmes.

Although this court has never been called upon expressly to consider in a criminal case whether a judicial decision may be a "law" within the meaning of the constitutional clause prohibiting any State from passing an *ex post facto* law, except in *Kring* v. *Missouri*, 107 U. S. 221, 227, 248, it has adjudged that a judicial decision may constitute a "law impairing the obligation of contracts." *Muhlker* v. *Harlem Railroad Co.*, 197 U. S. 544; *Louisiana* v. *Pilsbury*, 105 U. S. 278; *Butz* v. *City of Muscatine*, 8 Wall. 575; *Gelpcke* v. *Dubuque*, 1 Wall. 175. It is not to be assumed by counsel at the bar that this court intended to overrule these important and well-considered cases by its recent decision in *Cross Lake Club* v. *Louisiana*, 224 U. S. 632, for we find no discussion or mention of them in the opinion. But, nevertheless, it is submitted that there may be a very sound distinction between a case, on the one hand, which involves an inquiry into the validity and effect of a contract under the laws in existence when it was made and therefore reasonably requires the interpretation or construction of a statute, and, on the other hand, a case which does not fairly or reasonably involve the interpretation or construction of a penal statute at all, but in effect presents an arbitrary declaration of a new rule of law, the effect of which is to transmute an act innocent when done into a criminal offense.

There is, as it seems to us, no possible difference in principle or logic between the meaning of the word "law" in the phrase "*ex post facto* law" and the same word in the phrase immediately following, "law impairing the obligation of contracts." If the word "law" in the one case includes a judicial decision, it must include it in the

other.[1] There is, furthermore, infinitely greater reason and necessity in common fairness and justice for a broad and liberal construction of a provision relating to penal laws affecting life or liberty than there can, or ought to be, in the case of contract obligations. Mere contract rights should never be held to be as vital or as sacred as is the right to personal liberty.[2] The reasoning of the court in such cases as *Douglass* v. *County of Pike*, 101 U. S. 677, is just as applicable to *ex post facto* laws as to laws impairing the obligation of contracts. In that particular leading case, Chief Justice Waite, speaking for the whole court, said at p. 687:

> "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

It may be true, as a rule of comity between federal and state courts, that the construction of a state statute by the highest court of the particular State, however unreasonable it may be, will be adopted by this

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[1] In Lieber on Legal and Political Hermeneutics, 3rd ed., pp. 74–75, the famous publicist said: "No sentence, or form of words, can have more than one 'true sense,' and this is the only one we have to inquire for. This is the very basis of all interpretation. . . . Every man or body of persons, making use of words, does so, in order to convey a certain meaning; and to find this precise meaning is the object of all interpretation. To have two meanings in view is equivalent to having no meaning. The interpretation of two meanings implies absurdity."

[2] *Kring* v. *Missouri*, 107 U. S. 221, 233.

court as authoritative and binding for all *future* cases, whether civil or criminal; but the same considerations do not require that such a ruling should be adopted when plainly arbitrary, or should be permitted to reach back *ex post facto* and render criminal and punishable by imprisonment acts which were innocent when done. At best this is a rule of comity, and no more, and it should give way to a constitutional provision which this court cannot overlook or refuse to enforce without abdicating the performance of its highest duty and its most important function.[1] Unless this distinction be recognized, the arbitrary edict of a state judge or executive functionary professing or pretending to interpret a statute, could deprive individuals of their liberty and imprison them for doing acts entirely innocent theretofore and when done, and thus indirectly accomplish what the Constitution of the United States intended should not be done by state authority in any form or manner whatsoever.

When the framers of the Constitution used the word "law" in section 10 of Article I, and in other articles (*e.g.*, Art. VI), they were familiar with the broad definition of Blackstone and his division into "written or statute law" on the one hand and "unwritten or common law" on the other. It would have surprised them to have been told that a judicial decision was not a law. Their answer would have been that under the common law system then universally in force throughout the thirteen States, any State, speaking through its judges, could actually (although not theoreti-

[1] See for example *Bailey* v. *Alabama*, 219 U. S. 219, 234 *et seq.*, and *Butz* v. *City of Muscatine*, 8 Wall. 575, 581 *et seq.*, in neither of which this court acquiesced in the construction of a state statute by the highest court of the State.

cally) announce or pass a law just as fully, to all practical intents and purposes, as a legislature, and that the word "law" was much more comprehensive than the word "statute." Indeed, nine-tenths of the laws then in force in the Colonies and in England had been originally announced or passed by judicial decisions.[1] Nor can it be doubted that the words "law" and "*lex*" alike had long possessed "a wider meaning than *statute*" and that they included judge-made or pretorian law.[2] We venture to assert that no competent writer on law or jurisprudence in 1787, or at any time since, can be cited in support of the suggestion that the decisions of our courts, state or federal, are not laws to the same extent as are statutes.

It is, we submit, quite unwarrantable to attribute to the members of the Constitutional Convention of 1787, most of them trained lawyers and publicists, an ignorance of the comprehensive meaning of the word "law," or an intention to confine its operation solely to written or statute law as distinguished from judge-declared or common law. They were dealing with the substance of personal liberty, and they intended to prevent punishment in any manner or form for what was not criminal when done. Their object was not to strike at one but at all forms of violating an essential right of liberty. And it is unreasonable to assume that they did not appreciate that an *ex post facto* decision might be just as oppressive, tyrannical and cruel as an *ex post facto* statute. On the contrary, they were all familiar with the common law system and the existence of common law crimes, which had been made such by judicial

[1] *United States* v. *Wong Kim Ark*, 169 U. S. 649, 654.

[2] Salmond's Jurisprudence at pp. 469–473; see also §§ 9 and 52.

decision and not by statute: they were all living under a system of penal laws consisting in great part of common law or judge-made crimes.[1]

The Judiciary Act of September 24, 1789 (1 Stat. 73, c. 20), is perhaps the most famous, as it is certainly the most enduring, legislation of Congress. Our whole federal judicial system is still founded upon it, and later legislation has always adhered to its language. It was drafted by Senator, later Chief Justice, Ellsworth, and in the First Congress which enacted it were many of the members of the Federal Constitutional Convention.[2] No one can study the language of this statute, and particularly sections 25 and 34, without realizing that its framer understood the word "law" to mean and comprehend more than the word "statute." Thus, the language of the second clause of section 25, with reference to the class of cases now under consideration, is as follows: "or where is drawn in question the validity of a statute of, *or an authority exercised under any State*," etc. This clearly indicates the contemporaneous understanding as to the broad scope of the word "law" in contradistinction to the more restricted word "statute." More significant still is the provision in section 34 that "the laws of the several states . . . shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." It would undoubtedly have surprised Senator Ellsworth and his colleagues on the committee to

[1] Gray on Nature and Sources of the Law, § 533 *et seq.*

[2] Great weight has always been attached by the court to the contemporaneous interpretation of the Constitution embodied in the Judiciary Act. *Capital Traction Company* v. *Hof*, 174 U. S. 1, 9; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 297; *Börs* v. *Preston*, 111 U. S. 252, 256.

have been told that in employing this language they intended to refer exclusively to statutes and not as well to that much larger body of laws known as unwritten or common law and to be found only in the decisions of the courts of the several States and indisputably then, as now, the major part of the system of laws obtaining in every State.[1] Equally surprising to them would have been the declaration that the phrase "constitution or *laws* of any State to the contrary notwithstanding" in Article VI of the Constitution only meant "constitution and *statutes*."

An analogous situation arose under the Fourteenth Amendment, the pertinent provisions of section 1 of which read as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

At first, it was generally assumed at the bar that these prohibitions of the Fourteenth Amendment applied only to the statutes of a State; but it is now, of course, the firmly established rule of this court that they apply as well to the decisions or acts of state judicial or executive officers, thus recognizing that otherwise the things forbidden might easily be done by the States under cover of judicial decisions or executive decrees, and the beneficent effect of the Amendment materially curtailed. *Chicago, Burlington, etc., Rd.* v. *Chicago*, 166 U. S. 226, 233; *Scott*

[1] *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 360; *Nashua Savings Bank* v. *Anglo-American Co.*, 189 U. S. 221, 228; *Bucher* v. *Cheshire Railroad Co.*, 125 U. S. 555, 582; *Bendey* v. *Townsend*, 109 U. S. 665, 668; *Lorings* v. *Marsh*, 6 Wall. 337, 355; *Hinde* v. *Vattier*, 5 Pet. 398, 401; Gray on Nature and Sources of the Law, § 538 *et seq.*

v. *McNeal*, 154 U. S. 34, 45. See also *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20, 35, 36; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373; *Virginia* v. *Rives*, 100 U. S. 313, 318; *Ex parte Virginia*, 100 U. S. 339, 346–7. The result of these and other decisions is that it is clearly the incontrovertible doctrine that the Fourteenth Amendment restrains and limits the power of a State in all its departments, whether legislative, executive, or judicial; in other words, that it applies not only to statutes passed by a state legislature but likewise to the acts of state officers and the decisions of state judges.

There are a number of cases which recognize that the word "law" does not necessarily imply a statute or act of the legislature, and that it may include decisions of the courts. For example, in *Smith* v. *United States*, 1 Gall. 261, 266; 22 Fed. Cas. 694, 696, Mr. Justice Story said:

> "In an enlarged sense, without doubt, the word 'law' may include positive as well as common law; but in technical precision, the word 'law' is usually restrained to the common law, and other words, as 'statute' or 'act,' are applied to legislative provisions. Now the common law is, without doubt, as much 'made and provided' as the statute law, and therefore *proprio vigore* the expression, 'law made and provided,' does not necessarily imply a public act of the legislature."

And in *State* v. *Dyer*, 67 Vermont 690, 697, the court said:

> "The words, 'declared by law', do not necessarily or reasonably mean statute law only, but include the common law whenever it defines an offence and makes it punishable by imprisonment."

See also *Ferris* v. *Higley*, 20 Wall. 375, 383; *Fitzpatrick* v. *Simonson Bros. Mnfg. Co.*, 86 Minn. 140, 148; *Nelson* v. *Kerr*, 2 Thompson & C. (N. Y.) 299, 301, affirmed 59 N. Y. 224.

The verb "pass" used in the constitutional clause in question was not then confined in meaning or application, any more than it is now, to statutes or enactments by a state legislature or by Congress. The lexicographers all agree that the verb, when employed with relation to law, applies as well to judicial decisions as to statutes. Common definitions of the verb "pass" are "to express or pronounce an opinion, judgment, verdict, or sentence," and "to give forth a judgment or decision."[1] In this sense, "pass" is clearly not synonymous with "enact," which has a much more restricted meaning.

The State argues at page 112 of its brief that because the act of 1907, discussed below, is not on its face a criminal or penal statute "as far as plaintiff-in-error is concerned" and "does not make criminal nor prescribe any penalty for any of the acts charged against the plaintiff-in-error in the information," its interpretation and enforcement "cannot be for that reason an *ex post facto* law." But as this court emphatically said in *Burgess* v. *Salmon*, 97 U. S. 381, 385:

> "The cases cited hold that the *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal. *Cummings* v. *Missouri* [4 Wall. 277, 278, 319, 326]; Potter's Dwarris, 162, 163, note 9."

See the discussion of this point in Cooley's Principles of Constitutional Law, 3rd ed., p. 313, and in Cooley's Constitutional Limitations, 7th ed., pp. 375, 376.

Counsel conceive that it would be a ground of just reproach to our system of constitutional guaranties, which were intended by their framers adequately and effectively to secure

[1] *E. g.*, Century and Standard Dictionaries; Anderson's Law Dictionary, subdv. 4.

personal liberty, if it were now to be authoritatively declared by this court as the true meaning and intent of the Constitution of the United States, that no matter how plainly and clearly an *ex post facto* judicial or executive decision might arbitrarily create a new offense or crime and thereby degrade and punish by imprisonment or even death for an act innocent when done, no protection whatever was afforded against such oppression and tyranny by section 10 of Article I, simply because the word "law" was used in the Constitution rather than the phrase of the contemporaneous interpretation thereof in section 25 of the Judiciary Act, namely, "statute of, or authority exercised under, any State." It is earnestly and anxiously submitted that the true spirit of the Federal Constitution requires us to adopt a liberal and not a narrow and strict construction of section 10 of Article I. The language of Mr. Justice Bradley in *Boyd* v. *United States*, 116 U. S. 616, 635, cannot be too often repeated. In that familiar case, he eloquently and impressively urged "that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance."

III.

THERE IS NO ROOM FOR THE CONSTRUCTION OF A STATUTE IF THERE BE NO REASONABLE AMBIGUITY.

No rule of construction is more firmly established in our system of jurisprudence nor more essential to "a government of laws and not of men" than that where there is no ambiguity in the wording of a statute, and particularly of a

penal statute, there is no room or excuse for construction. In the early leading case of *United States* v. *Wiltberger*, 5 Wheat. 76, 95, Chief Justice Marshall referred to "the plain principle that the power of punishment is vested in the legislative, not in the judicial department," and that "it is the legislature, not the court, which is to define a crime, and ordain its punishment." This principle has been repeatedly recognized and applied by this court. *Hamilton* v. *Rathbone*, 175 U. S. 414, 419, 421; *United States* v. *Goldenberg*, 168 U. S. 95, 102; *Sarlls* v. *United States*, 152 U. S. 570, 575; *United States* v. *Chase*, 135 U. S. 255, 261, and cases cited.[1]

In discussing the principle that a crime should not be created by the court under color of the construction of a statute, where there is no ambiguity, the Circuit Court of Appeals, Sixth Circuit, in *The Ben R.*, 134 Fed. 784, 786, among other things said by Circuit Judge Lurton:

> "But it was long ago observed by Chief Justice Marshall, when asked to extend a criminal statute to places not enumerated in the act because it was improbable that Congress intended to make the differences with respect to place which the words of the law imported, that 'probability is not a guide which a court, in construing a penal statute, can safely take.' Such an argument, when based not upon an ambiguity of language, but upon the mere fact that the cases enumerated in the statute are kindred to a case not so enumerated but within the mischief intended to be remedied, is an appeal to legislative rather than judicial power. To extend a penal statute to a case not specifically described, the intention of the Legislature must be ascertained from the words of the act, and not made out by conjecture as to the purpose of the lawmaker or based upon probabilities."

[1] See also 2 Sutherland's Statutory Construction, Lewis' ed., §§ 366 and 367; Bishop on Written Laws, §§ 72 and 80.

When the alleged crime in the case at bar was committed, it had for forty years been the "well settled rule of law [in Oregon] that no one can be punished for doing an *act*, unless it clearly appears that the *act* sought to be punished comes clearly within both the spirit and letter of the law prohibiting it" (*State of Oregon* v. *Mann*, 2 Ore. 238, 241), and upon this established rule of criminal law the citizens of Oregon were justified in relying. Indeed, the long recognized rule of all systems of jurisprudence among civilized peoples is that "laws which create crimes, ought to be so explicit in themselves, or by reference to some other standard, that all men, subject to their penalties, may know what acts it is their duty to avoid" (Mr. Justice Washington in *United States* v. *Sharp*, Peters C. C. 118, 122). See also to same effect *United States* v. *Brewer*, 139 U. S. 278, 288; Bishop on Statutory Crimes (3rd ed.), sec. 41.

In the case at bar, as will be demonstrated below, no constitutional provision or statute of the State of Oregon can be cited which presents any ambiguity whatever, or which can be reasonably construed to create the alleged criminal offense. The judgment of conviction and sentence is based solely upon an arbitrary construction of a statute which in no way or manner indicated the intention of the legislature to create any such infamous crime as that for which the plaintiff-in-error stands convicted and condemned to the disgrace of five years' imprisonment in the state penitentiary. Moreover, the jurisdiction of the state court to proceed further with the criminal charge against the plaintiff-in-error in the absence of an indictment was only upheld by arbitrarily implying a saving clause in the constitutional amendment of 1908, which

was plainly intended to put an end forever in Oregon to the prosecution of charges of crime except upon indictment found by a grand jury (see discussion at p. 54 under point V).

IV.

THE FACTS SHOWING THE ARBITRARY CHARACTER OF THE STATUTORY CONSTRUCTION AND THE EX POST FACTO OPERATION OF THE LAW ENFORCED BY THE COURT BELOW.

At the time of the nation-wide panic of 1907, which temporarily crippled and embarrassed so many financial institutions throughout the country, the plaintiff-in-error, J. Thorburn Ross, was acting as one of the directors and as president of the Title Guarantee and Trust Company, a corporation organized and existing under the laws of the State of Oregon and then carrying on at Portland in the County of Multnomah in said State the business of banking and dealing in abstracts of title, insurance of titles, brokerage, the sale of real estate on commission, and other services for compensation (record, p. 23). For thirty years prior thereto, it had been the custom of the state treasurer of Oregon to deposit state funds in banks or trust companies as ordinary deposits subject to payment on demand.[1] This was shown by the public records of the State, of which the court below was authorized to take judicial notice (see appendix, p. 15). The evidence also showed that, "since January 9, 1899, the bulk of the funds in the treasury of the State had been deposited in banks in the State subject to check, the said deposits being demand deposits, and the

[1] As to the legal relation thereby created, see *Thompson* v. *Riggs*, 5 Wall. 663, 678; *Bank of the Republic* v. *Millard*, 10 Wall. 152, 155; *Phœnix Bank* v. *Risley*, 111 U. S. 125, 127; *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. 96, 106.

state treasury being in each case treated like any other general depositor in the bank" (p. 24). It was further proved that the banks had not been notified as to whether the funds in their possession belonged to the general fund in the custody of the state treasurer or to any special fund, "and that in fact there had been no segregation of those funds except that the books of the state treasurer at all times showed what moneys were to the credit of each fund of which the state treasurer was the custodian" (ibid.).

Prior to 1907, there had never been any statute regulating the actual custody or deposit of state funds by the state treasurer. There was only a general provision making him the custodian of state funds (see sec. 2408, B. & C. Code, printed in appendix, p. 4). However, it had been the custom of the state treasurer, as well as of the clerk of the state land board, to deposit public funds, including the three educational funds referred to below, in banks in the form of general deposits subject to check, without any segregation except on the books of the treasury department and without in any case advising the banks of the nature of the funds deposited with them (p. 31).[1] This long-established custom had received judicial recognition and approval by the Supreme Court of Oregon in *Baker* v. *Williams Banking Co.*, 42 Ore. 213; 70 Pac. 711. The court below recognized this case as correctly declaring the law of the State, and did not overrule it or question its soundness. In the *Baker* case, the court had before it facts involving deposits of state school funds by the state treasurer and

[1] Although the offer to prove this custom was excluded on the trial, it was nevertheless a matter of general knowledge and official record of which the court below was bound to take judicial notice, and hence this court may properly do so. See secs. 719 and 720, B. & C. Code, printed in appendix, p. 15; *Lloyd* v. *Matthews*, 155 U. S. 222, 227.

the clerk of the state land board, and it then used the following language (42 Ore. 213, at p. 223):

> "A public officer may not loan, with or without interest, any part of the public funds in his possession, without being guilty of a felony; but he is required to keep such funds safely, and for that purpose may deposit them in a bank, provided they are at all times subject to his order, and there is no fixed period during which he has no right to demand their return. *In re Law's Estate*, 144 Pa. 499 (22 Atl. 831, 14 L. R. A. 103); *Allibone* v. *Ames*, 9 S. D. 74 (68 N. W. 165, 33 L. R. A. 585); *State* v. *McFetridge*, 84 Wis. 473 (54 N. W. 1,998. 20 L. R. A. 223); *State* v. *Hill*, 47 Neb. 456 (66 N. W. 541); *Thompson* v. *Territory*, 10 Okla. 409 (62 Pac. 355). The deposit is made on his own personal responsibility, however; and if, in case of the failure of the bank, he makes the loss good, the money deposited must necessarily become his property, and thereafter be considered and treated as such."

In view of this decision of the highest court of Oregon, it was thereafter assumed as the settled law of the State that the state treasurer unquestionably had authority to deposit state funds in a bank for safe-keeping, subject to his order or check on demand, but that he made such deposits on his own personal responsibility and that in case of the failure of the depository, he had to make the loss good.

In February, 1907, the legislature for the first time undertook to regulate by statute the subject of the collection and deposit of state funds and of interest thereon, and to that end enacted chapter 135 of the laws of 1907 taking effect May 26, 1907 (printed in appendix, p. 7). The objects of this enactment, as appears on its face, are (1) to regulate deposits of state funds, (2) to require their deposit in banks or trust companies, (3) to exact security for any

and all deposits of state moneys, (4) "to secure to the state interest on state moneys", and (5) to relieve the state treasurer from being, as theretofore, "liable personally or upon his official bond for any moneys that may be lost by reason of the failure or insolvency of any bank which becomes a depository under this act" (sec. 10). The act authorizes the appointment of any number of depositories of state funds and provides that they shall pay interest on deposits at a rate "not less than two per cent. per annum" (sec. 3), but authorizes the appointment of only one bank or trust company in the City of Salem or the City of Portland (being the two largest cities and financial centres in the State) as "an active depository for the collection of any drafts, checks, certificates of deposit and coupons that may be received by [the state treasurer] on account of any claim due the State" (sec. 6). There is no provision in the act prohibiting deposits of any state funds whatever, whether "Educational" or otherwise, in a bank or trust company and no provision forbidding the state treasurer from taking any part of the proceeds of collections made by the "active depository" and depositing them with any other depository. The act, however, makes it mandatory to deposit all state funds in approved depositories at not less than two per cent. interest (sec. 3), except three specific permanent funds which are excluded from this mandatory provision by section 16, namely, "the common school, agricultural college, and university funds." No provision, however, is made as to the deposit of any part of these funds after their collection by the state treasurer and pending their permanent investment as required by special laws (see sec. 37, ch.

117, L. 1907, printed in appendix, p. 7), in this respect leaving the law as it had been declared to be in *Baker* v. *Williams Banking Co.*, *supra*, that is to say:

> "He [the state treasurer] is required to keep such funds safely, and for that purpose may deposit them in a bank, provided they are at all times subject to his order, and there is no fixed period during which he has no right to demand their return."

The Title Guarantee and Trust Company was duly designated as one of the "state depositories for the purpose of receiving on deposit funds of this State"[1] under section 1, and as the only "active depository" under section 6 of the act of 1907 (p. 26). On June 3rd, 1907, George A. Steel, the state treasurer, had on general deposit with the Trust Company a large sum of money to his credit as state treasurer which consisted of various state funds; but on that date he sent a letter to the Trust Company (pp. 24–25) enclosing "for credit of Geo. A. Steel, State Treasurer, 'Educational,' the following checks:

No. 319 Geo. A. Steel, State Treasurer, on you.....	$272,449.02
No. 34 Geo. A. Steel, State Treasurer, on Ladd & Tilton.....	2,600.00
	$275,049.02"

Prior to August 20th, 1907, the state treasurer of Oregon deposited other checks for collection with similar written instructions, but in no case indicated that the moneys represented by such checks belonged to any of the three funds specified in section 16 of the act of 1907. These deposits were entered and credited upon the Trust Company's books to an account entitled "George A. Steel, State Treasurer, Educational," and the existing account with it as de-

[1] This appeared from official records.

pository entitled "George A. Steel, State Treasurer" was continued (pp. 24–26). The so-called "Educational account" is the only account which figures in the alleged crime charged to have been committed by the plaintiff-in-error and now to be considered.

Down to and including August 20th, 1907, the cash on hand in the Trust Company always exceeded the balance due from it on the said account "George A. Steel, State Treasurer, Educational" (p. 26); but the following day, undoubtedly as the result of the prevailing panic and consequent run on banking institutions and the withdrawal of deposits by other depositors (p. 33), the cash on hand of the Trust Company was reduced to $337,011.87, whilst the balance due from it on the said "Educational" account was $337,308.06, so that the cash was then short by $296.19 of enough to pay on demand the balance to the credit of said account (p. 26). This shortage of cash continued and increased until November 6th, when it amounted to $274,882.73 (p. 27), on which date a receiver of the Title Guarantee and Trust Company was appointed by order of the United States circuit court for the District of Oregon (p. 23). The order contained an unusually sweeping restraint upon the officers and directors, commanding them to turn over all assets to the receiver and enjoining them from interfering therewith (see order, p. 16, appendix, printed and submitted by consent because in evidence on the trial). In the meantime, however, and on October 29th, 1907, the state treasurer, acting under sections 5 and 10 of the act of 1907, had demanded security from the Trust Company for all the state moneys on deposit to the credit of both accounts to the amount in the aggregate of over $395,000,

and this security had been duly furnished (pp. 31, 33), so that the State was abundantly secured and protected. The state treasurer has since been paid the amounts of the several deposits with interest, as duly appeared by the public records at the time of the final decision in the court below (see, as to the "Educational" account, appendix, p. 22).

Prior to the appointment of the receiver and his taking "possession of the assets and properties of the Title Guarantee and Trust Company on the 6th of November, 1907" (p. 27), the state treasurer did not make any demand whatever for any part of the moneys due him on either of said accounts (p. 31), and it was not until after such appointment and on November 12th that he made a written demand on the Trust Company and its receiver in the following language (pp. 27–28):

> "To Title Guarantee & Trust Company, a corporation, and G. H. Hill, Receiver.
>
> I, Geo. A. Steel, as State Treasurer of the State of Oregon, on my own behalf as such State Treasurer, and on behalf of the State of Oregon, hereby demand immediate payment to me as such State Treasurer for the State of Oregon and for its uses and benefit the sum of $395,951.24 money due me as such State Treasurer from said Title Guarantee & Trust Company and belonging to the State of Oregon, to wit:
>
> | | |
> |---|---|
> | Active fund | $47,483.81 |
> | With interest thereon to November 6, 1907 | 40.56 |
> | Also six demand certificates of deposit, each dated March 15, 1907, of $10,000 each | 60,000.00 |
> | Also the sum of (known as the educational fund) | 288,426.87 |
>
> Dated at Portland, Oregon, November, 12, 1907.
>
> GEO. A. STEEL,
> State Treasurer of the State of Oregon."

Four months after the giving of security for all money due to the state treasurer and the appointment of a receiver, one of the district attorneys in the State of Oregon, in accordance with statutory authority then existing, filed an information against the plaintiff-in-error, in which he charged that the latter and three other directors of the Title Guarantee and Trust Company had on September 9th, 1907, converted to their own use the funds deposited by the state treasurer and credited to the account "George A. Steel, State Treasurer, Educational," which funds were alleged to be "part of the Irreducible School Fund, and the Agricultural College Fund and of the University Fund of said State," in violation of section 1807 of Bellinger & Cotton's Annotated Codes and Statutes of the State of Oregon, and further charged that the defendants had had possession of these funds belonging to the State, etc., "for safe-keeping and to be returned to the said State and to the legal custodian of said money upon legal demand therefor" (pp. 2–3).

The uncontradicted evidence showed that the plaintiff-in-error had never converted to his own use any moneys whatever belonging to any fund of the State of Oregon and had never received any money from the State (p. 27). There was no evidence that he or any other officer or director knew or was chargeable with knowledge that any part of the funds on deposit with the Trust Company belonged to any particular state funds (p. 30); there was no evidence that he had ever had anything to do with the handling of state funds or any personal knowledge thereof except as such knowledge might be imputed to him from the mere fact that he was the president and a director of

the company, and there was no statute charging officers or directors with criminal liability for the acts of the employees of a bank or trust company, there being seventy or eighty employees of the Title Guarantee and Trust Company (p. 30). The plaintiff-in-error was, nevertheless, held criminally liable for constructive conversion and sentenced to imprisonment and fine on the ground that, as he was the president and a director of the Trust Company, he was personally guilty of larceny because the Trust Company, having credited to the state treasurer a deposit of certain state funds, had commingled the same with other deposits, or failed to keep on hand at all times cash in excess of the amount due the State, or else had failed to pay the amount of such deposit when it was demanded after the appointment of a receiver.

It is, of course, the settled law that a corporation cannot be held criminally liable for the acts or neglect of its receiver, since the latter has complete control of its property and affairs and it is powerless and forbidden by law to interfere. *State* v. *Vermont Central Rd. Co.*, 30 Vt. 108; *State* v. *Wabash Ry. Co.*, 115 Ind. 466; *State* v. *Minn. & St. L. Ry. Co.*, 88 Ia. 689. The same principle clearly operates to exempt an officer or director of a corporation from criminal liability for an act or neglect on its part that occurred after the appointment of a receiver by a circuit court of the United States and the issue of such an injunction order as is mentioned above.

The particular act or acts of the plaintiff-in-error adjudicated to have been criminal are not clearly disclosed either in the charge of the trial judge to the jury or in the opinion of the Supreme Court of Oregon. Indeed, he was con-

victed by the jury on one theory or interpretation of the act of 1907 (p. 46–48), and the conviction was upheld in the appellate court on quite a different theory or interpretation (pp. 57, 105–106). In final analysis, however, the crime of which the plaintiff-in-error was ultimately adjudicated to have been guilty must have consisted of one or more of the following acts: (1) that the Trust Company, of which he was president and a director, had suffered or permitted collections credited on its books to the "Educational" account to be commingled with other deposits, or (2) that it had suffered or permitted the cash on hand at any time to be less than the amount credited to the state treasurer in such "Educational" account, or (3) that it and its receiver had failed or refused to pay on demand the balance due on such account. The latter was the distinct theory upon which the information was based (p. 3).

There was, however, no statutory or constitutional provision of the State of Oregon prohibiting the state treasurer from making a general deposit of any funds in his custody, or making any of the acts above mentioned criminal, or making any officer or director of a banking institution personally liable for its acts or neglect or for the acts or neglect of its receiver.

The penal law which the plaintiff-in-error was alleged personally to have violated (p. 2) was originally enacted in 1864,[1] and its material portion reads as follows:

> "If any person shall receive any money whatever for this state . . . or shall have in his possession any money whatever belonging to such state . . . and shall in any way convert to his own use any portion thereof . . . such person shall be deemed guilty of larceny."

[1] See Bellinger & Cotton's Codes, Sec. 1807, printed in full in appendix, p. 4.

The same statute was before the Supreme Court of Oregon in the *Baker* case, *supra*, being then cited as Hill's Ann. Laws, sec. 1772, and it was held, with respect to school funds in the custody of the state treasurer, that "a mere deposit in a bank for safe keeping is not inhibited by this provision" and that he "may deposit them in a bank." And the court below declared in the case at bar that "the decision in *Baker* v. *Williams* . . . is not here questioned" (p. 105).

It was insisted below by the plaintiff-in-error, as it is insisted in this court, that prior to the statute of 1907 none of the acts of the plaintiff-in-error, individually or as the president and a director of the Trust Company, were forbidden by any law—written or unwritten—of the State of Oregon. It was further insisted, as it is insisted now, that the statute of 1907 did not forbid any such acts and did not create any such crime as that for which he was condemned to imprisonment, and that the act of 1907 did not create or define any crimes whatever except in and by sections 11, 12 and 13 which are not applicable to this case. When the legislature intended to create crimes, it adequately defined them, specified the persons liable and prescribed the punishment therefor. There can be no shadow of pretense that any of the crimes provided for in sections 11, 12 and 13 were committed by the plaintiff-in-error.

Now this court cannot get a more correct conception of the theory of the prosecution in the case at bar and of the nature of the law enforced by the learned state court than by considering the statements contained in the brief filed on behalf of the State in support of its motion to dismiss. Thus the following will be found at p. 112:

"The law of 1907 is not an *ex post facto* law if it is not a criminal or penal statute as far as plaintiff-in-error is concerned. It is true the act makes it a crime and prescribes a penalty for the state treasurer to make a profit out of loaning the state's money, *but it does not make criminal nor prescribe any penalty for any of the acts charged against the plaintiff-in-error in the information.*[1] The only relation that that act had to the prosecution of plaintiff-in-error was that it showed that plaintiff-in-error held the state's money as a trustee and not as a debtor. Plaintiff-in-error was accused under Section 1807 of Bellinger & Cotton's Annotated Codes and Statutes of Oregon for converting to his own use money belonging to the State of Oregon. *The acts charged in the information were in no wise prohibited by the law of 1907, which is claimed to be ex post facto, nor was any penalty prescribed for committing any of the acts charged in the information.*[1] The only provision of the act penal in its nature was a prohibition against the loaning of money by the state treasurer. The act, so far as it relates to the prosecution of the plaintiff-in-error, is not penal or criminal, and therefore cannot be for that reason an *ex post facto* law."[2]

In fact, the whole case of the plaintiff-in-error in this aspect rests on all fours upon the contention, now apparently conceded, that "the acts charged in the information were in no wise prohibited by the law of 1907, nor was any penalty prescribed for committing any of the acts charged in the information." This being so, what possible escape can there be from the conclusion that the state court was not warranted in holding that the provisions of the act of 1907 created or in any way defined or made certain the crime for which the plaintiff-in-error was condemned?

The above quotation from the argument of the State contains, it is true, a statement perhaps intended to

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[1] Italics are not in brief of State.

[2] See supra, p. 21.

qualify the context, viz.: "The only provision of the act penal in its nature was a prohibition against the loaning of money by the state treasurer." But the court will search in vain for any such prohibition, or for any language which could imply that the state treasurer was not to be at liberty to deposit in bank any part of the educational funds of the State in his custody, but must keep them in his own personal possession or in the vault or safe of the treasurer's department until permanently invested or otherwise duly disposed of as authorized by statute.

It is perfectly clear from the opinions of the lower court that its ruling was based wholly upon the act of 1907, and that, while professing to construe this statute, the court in effect arbitrarily created a new crime which was not even remotely contemplated by the law-makers.

The statute is entitled "An Act to secure to the State interest on state moneys, to provide depositories for state funds; defining the duties of the state treasurer in relation thereto; prescribing the security to be given and providing for the approval thereof." [1] The first five sections provide for the creation and appointment of banks or trust companies as state depositories, make it mandatory for the state treasurer to deposit with such depositories "the amount of money in his hands belonging to the several funds in the state treasury," and require the depositories to pay interest thereon and give security for the repayment thereof on demand. Section 6 provides for the designation by the state treasurer of "a bank or trust company . . . as an active depository for the collection of any drafts, checks,

[1] See appendix, p. 2, for constitutional provision that an act shall embrace "but one subject, and matters properly connected therewith, which subjects shall be expressed in the title." § 20, Art. IV, Oregon constitution

certificates of deposit and coupons that may be received by him on account of any claim due the State." Section 7 requires such active depository to give security for the prompt collection of all paper, the prompt payment of the proceeds thereof, and the safe keeping of the moneys so collected. Section 8 declares it to be "the duty of such active depository to collect [drafts, checks, or certificates of deposit given for state dues] without delay, without charge for its services for such collection, or for exchange," and further provides that "the compensation to be paid by such active depository [clearly for the use of the funds collected and held on deposit] shall be fixed by the state treasurer upon the best terms obtainable for the State." Section 9 provides that the bonds required under the act may include surety company bonds, and that the security may include government, state and municipal bonds and other evidences of public indebtedness. This section further commands that "no securities shall be approved unless their market value shall equal their par or face value." In section 10, the state treasurer is empowered to cause an investigation to be made at any time in order to ascertain the sufficiency of a depository or its security, and to require new or additional security whenever he deems fit. The section further directs that "the state treasurer shall not be liable personally or upon his official bond for any moneys that may be lost by reason of the failure or insolvency of any bank which becomes a depository under this act." Section 11 makes it a felony for the state treasurer to use public moneys for his own benefit; section 12 makes the wilful disobedience of the act by the

state treasurer a misdemeanor, and section 13 makes it a felony for any person to offer or give a bribe to the treasurer for the purpose of inducing him to deposit state funds in any bank contrary to law. No other penal provisions are contained in the act than in sections 11, 12 and 13. The state treasurer is authorized by section 14 to sell the securities deposited by any bank or trust company which fails or refuses to pay over state funds or any part thereof upon the check or demand of the treasurer. Section 16 defines the word "funds" as used in the act to be applicable to all funds in the state treasury except the common school, agricultural college, and university funds, and adds that "nothing in this act shall be construed to deprive the state land board of the power to invest or dispose of the funds derived from the sale of public lands as is now provided by law." There is not a single word in the act intimating that any deposit of state funds is to be treated as a trust fund or bailment.

An examination of the act of 1907 will show that sections 6, 7 and 8 authorize the appointment by the state treasurer of only one "active depository" in order to establish a central banking agency at Salem or Portland "for the collection of any drafts, checks, certificates of deposit and coupons that may be received by him on account of any claim due the State." There is not the slightest intimation in the statute of any intention on the part of the legislature to provide that the proceeds of such collections are to be taken in specie or bank notes and deposited in a vault for safe-keeping or otherwise segregated from other banking funds of the active depository. The active depository under section 8 is to collect "without delay, without charge for its

services for such collection, or for exchange" and "the compensation to be paid *by* such active depository" [*i. e.* clearly for the use by it of the funds collected and held on deposit] is to "be fixed by the state treasurer upon the best terms obtainable for the State." Any one having the slightest familiarity with or knowledge of modern banking must perceive at once that, as the active depository could make no "charge for its services," and as it was to pay compensation for the use of the proceeds of collections, it could not possibly have been intended by the law-makers to prevent the depository from using the proceeds of collections in its banking business as a general deposit. This has been elemental in banking for more than a century. In *Henry County* v. *Salmon*, 201 Mo. 136, 162; 100 S. W. 20, 26, the Supreme Court of Missouri used the following apposite language:

> "It . . is only in dreams that a bank pays for the privileges of keeping a special deposit—the bailor pays, not the bailee, under such circumstances. Therefore, the statutory plan does not involve the notion of a special deposit, but it necessarily involves the notion that the depositary was to use the funds, and pay for that use. It follows that such funds were not to be kept as the servant of old kept his pound, *i. e.*, laid up in a napkin."

The learned court below, however, read into this act of 1907 a penal provision to the effect that the proceeds of all checks deposited for collection and "for credit of Geo. A. Steel, State Treasurer, 'Educational'" were to be treated by the Trust Company and all its officers and directors as a bailment of specific specie or bank notes, or, if not so treated, then that such active depository at its peril must not permit other depositors to withdraw their deposits if such withdrawals would reduce its cash actually on hand

below the amount standing to the credit of the state treasurer in the "Educational" account, no matter how solvent the bank or trust company might otherwise be! Recognizing the absurdity and preposterousness in common sense and simplest business sagacity of requiring a bank or trust company to act as an active depository without charge for its services for making collections and exchanges, and yet, despite that fact, to expect it to pay compensation for the privilege of collecting state funds, the learned court below dogmatically stated that it was evidently not the purpose of sections 6, 7 and 8 that the active depository should be "required to pay interest on funds deposited thereunder," in the very teeth of the fact that the main purpose of the whole act, as disclosed in its title and throughout its provisions, was "to secure to the State interest on state moneys," and of the express and specific provision of section 8 that "the compensation to be paid *by* such active depository shall be fixed by the state treasurer upon the best terms obtainable for the State." But not only was compensation to be paid but security was to be furnished as well. Of course, *interest* is nothing but *compensation* for the use or detention of money. The only answer that the learned court below could make to this conclusive consideration was the following (p. 57):

> "The writer [of the opinion of the court] is unable to understand the purpose of the last clause of section 8, unless it is to give to the State the benefit of any deal that the treasurer might be able to make for compensation, but whatever the intention, it cannot change the meaning of these sections."

Thus, in one breath the court declared that the active de-

pository was not to "be required to pay interest on funds deposited thereunder" (*i. e.*, under sections 6, 7 and 8), and in the next breath it confessed its inability to understand part of section 8 unless as showing the *intention* of the law-makers to provide for interest to be "fixed by the state treasurer upon the best terms obtainable for the State." And to support this arbitrary construction the court cited (p. 58) the case of *State* v. *Bartley*, 39 Neb. 353, 364, in which the Nebraska court had said:

> "While the statute mentions 'safe keeping,' when the several provisions are construed together it is quite clear that the transaction contemplated does not amount to a special deposit. Whoever heard of that kind of a deposit of money being paid out on checks, or of a banking institution paying for the privilege of holding a special deposit of funds? The identical moneys deposited are not required to be returned. Obviously the bank receiving them had the right to use and control the money as its own. It could loan the funds for the purpose of earning the money with which to pay the stipulated interest due the state."

In considering the unreasonable and arbitrary character of the construction by the state court of a perfectly plain and unambiguous statute, it should be borne in mind that there is no question that if the proceeds of any collections made by the active depository under sections 6, 7 and 8 of the act of 1907 had been handed in specie and bank notes to the state treasurer, there was nothing to prevent him from immediately depositing any part thereof with a trust company or bank as a general deposit. In fact, had the collections been specifically all made for account of any or all of the three educational funds mentioned in the information (p. 3), there was no statutory provision to prevent the state treasurer from depositing the same moneys

to his credit in his general account with the Trust Company, which was what he had been doing for years and continued to do in 1907. The fact that on June 3, 1907, he drew a check on the Trust Company directing it in effect to open a new account entitled "Educational" and to "credit" $275,049.02 to that account, was no different in substance and effect than if he had come there with so much cash and made a deposit to the credit of a new account so entitled. No one has yet contended that if the state treasurer on June 3, 1907, had in his custody $275,000 belonging to any fund, educational or otherwise, he could not have deposited it in the Trust Company to his credit for safe-keeping subject to check on demand and have then and there stipulated for interest on such deposit, or that the acceptance of such a general deposit by the Trust Company would have rendered all its officers and directors guilty of an infamous crime! The *Baker* case was clear authority for such a deposit of "Educational" funds; the court below in the case at bar recognized the authority of that precedent as unimpaired, for it said that the decision "is not here questioned" (p. 105), and, to repeat, there is no statute or constitutional provision to the contrary.

The learned court below, however, attached controlling importance to section 16 of the act of 1907 as indicating the intention of the legislature to provide that certain funds should be held after collection by the active depository as trust funds in bailment or special deposit and as implying that acceptance by any bank or trust company of any part of such funds as a general deposit would render its officers and directors criminally liable even though they did not know the specific sources of the funds. That section reads as follows:

"The word 'funds' used in this act shall apply to all funds in the state treasury except the common school, agricultural college, and university funds. Nothing in this act shall be construed to deprive the State Land Board of the power to invest or dispose of the funds derived from the sale of public lands as is now or may be provided by law."

Obviously, the purpose of this section was to provide that the mandatory provisions of section 3 of the act *requiring* the deposit of all funds in the state treasury should not apply to these particular educational funds or compel their permanent deposit at two per cent. interest. Otherwise, all authority to invest these particular funds as provided in other statutes would have been repealed and the whole act would have been rendered of doubtful constitutionality in view of the provisions of Article VIII of the Oregon constitution. These three funds were permanent or "irreducible" funds, and it would have been imprudent and unbusinesslike to require that they must be deposited in bank at a low rate of interest rather than permanently invested as opportunity offered at the higher rate obtaining in Oregon for safe and conservative investments. On the other hand, current moneys not belonging to these three permanent and irreducible funds might properly be deposited subject to check on demand at a very low rate of interest and directed to be kept in banks until the current needs of the State required their use.

It should also be borne in mind that there is no such nomenclature in the terminology of the Oregon constitution and statutes as "educational funds," not even in the act of 1907, and that there are a number of funds or sources of income available for educational purposes in addition to the Irreducible (or Common) School Fund, the Agricultural College Fund and the University Fund, which are the three

funds mentioned in the information (p. 3).[1] Hence, the mere direction of the state treasurer "for credit of Geo. A. Steel, State Treasurer, 'Educational,'" did not imply that the funds belonged to the three specific funds mentioned in the information or in section 16 of the act of 1907. For all that then appeared, and presumably, these fixed and irreducible funds had been duly and permanently invested and the state treasurer was dealing with other educational funds raised by annual taxation for the current needs of the educational system of the State. That certainly was the logical and proper presumption. Such funds would ordinarily be called "educational funds" in order to distinguish them from the specific funds mentioned in section 16, and, if so, any such "educational funds" had to be deposited under section 3 of the act of 1907.

It will be instructive to consider at this point the provisions creating the three specific funds in question in order to show the reason for treating them as different from the current or general educational funds of the State of Oregon and distinguishing them by special names.

The act of Congress of February 14, 1859, 11 Stat. 383, c. 33, which admitted Oregon into the Union, provided in section 4 for the submission of certain propositions to the people of the Territory, and these propositions were duly

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[1] Thus there was a continuing annual appropriation for the Agricultural College which was levied and collected as other state taxes [B. & C. Code § 3541, L. 1901, p. 15, § 2, s.s. as amended by L. 1907, chap. 283, p. 416]; and a similar appropriation levied and collected in the same manner for the State University [B. & C. Code § 3529, L. 1901, p. 15, § 1 s.s. as amended by L. 1907, chap. 64, p. 116]. See appendix, p. 5. The common or irreducible school fund referred to in the information consisted of funds in addition to those mentioned in section 5 of Article VIII of the Oregon constitution providing for the investment of the proceeds of the sale of lands. See section 2, Art. VIII of Oregon constitution; L. 1907, ch. 117, §§ 36 and 37, in appendix, pp. 1, 6.

accepted. The first proposition declared "that sections numbered sixteen and thirty-six in every township of public lands in said State . . . . shall be granted to said State for the use of schools." This is admittedly the origin of the common or irreducible school fund. The second proposition provided "that seventy-two sections of land shall be set apart and reserved for the use and support of a state university . . and . . appropriated and applied in such manner as the legislature of said State may prescribe for the purpose aforesaid, but for no other purpose." This is the origin of the state university fund. The act of Congress of July 2, 1862, 12 Stat. 503, c. 130, and the acts amendatory thereof, 22 Stat. 484; 26 Stat. 417, 418, created the agricultural college fund. It granted to the several States 30,000 acres for each senator and representative in Congress to which the State was entitled under the census of 1860, provided for the sale of the land and the investment of the proceeds thereof, and required that the interest derived from this fund be used for the endowment, maintenance and support of at least one agricultural college, and that the capital should remain forever undiminished. In 1870 the legislature of the State of Oregon duly accepted this act. This is the origin of the agricultural college fund.

The constitution of the State of Oregon was adopted in 1857 and went into effect February 14, 1859, at the time the Territory became a State. Section 5 of Article VIII is the only constitutional provision relied on by the court below or on behalf of the State as having any relation whatever to this case.[1] It reads in part as follows:

"The governor, secretary of state, and state treas-

[1] See §§ 3295 and 3296, B. & C. Code, printed in appendix, p. 3, creating State Land Board and power and duties thereof.

urer shall constitute a board of commissioners for the sale of school and university lands, and for the investment of the funds arising therefrom, and their powers and duties shall be such as may be prescribed by law."

Although not mentioned in the opinion below, section 2 of the same Article VIII of the Oregon constitution enlarged and defined the "Common School Fund," and further provided that the revenue from certain specified sources "shall be set apart as a separate and irreducible fund to be called the common school fund, the interest of which, together with all other revenues derived from the school land mentioned in this section shall be applied exclusively to the support and maintenance of common schools in each school district, and the purchase of suitable libraries and apparatus therefor."

There is no evidence, nor has there so far been any suggestion, that any part of the so-called "educational funds" on deposit with the Title Guarantee and Trust Company from June to November, 1907, represented the proceeds of the sale of school and university lands. This court will not, therefore, be able to perceive the slightest pertinency of the statement in the majority opinion of the learned court below (p. 57) that "it is not in the power of the legislature to make provision for a loan or use of educational funds", by reason of any limitation upon the power of the legislature in section 5 of Article VIII of the Oregon constitution.

But even though we assume, only, however, for the sake of the argument, that it had been proved that the funds in question on deposit with the Title Guarantee and Trust Company actually represented the proceeds of the sale of school

and university lands and that such fact was known to the plaintiff-in-error, we submit that the constitutional provision plainly, beyond peradventure and beyond any necessity for construction, authorized the investment of the funds derived from any such sales and vested in the legislature authority to prescribe the powers and duties of the board of commissioners in that and other respects.[1] The constitutional provision is so clear that we have only to read it. It could not reasonably be construed so as to prohibit the board of commissioners or the state treasurer from making a temporary deposit of the proceeds of a sale of school or university lands with a bank or trust company for safekeeping pending their investment.

An examination of the evidence as to the criminal conversion alleged to have been committed by the plaintiff-in-error will convincingly show the real character of the decision of the court below and the arbitrary nature of its construction of the act of 1907.

The mere fact that the Trust Company was directed by the state treasurer to credit an "Educational" account (p. 24), or to collect checks and credit the same thereto (p. 25), did not, as we have seen, indicate that any part of the amount thus to be credited necessarily belonged to any of the three specific funds mentioned in the information, particularly in view of the fact that there were indisputably various statutes creating other sources of educational funds. Moreover, although evidence was introduced on the trial that "the funds left or deposited with the Title Guarantee and Trust Company to the credit of

[1] See § 37, ch. 117, L. 1907, printed in appendix at p. 7, where the legislature has acted with respect to the investment of these funds.

George A. Steel, State Treasurer, Educational, included funds belonging to each of the funds described in the information" (p. 40), no notice of that fact was ever given to the plaintiff-in-error or to the Trust Company. The state treasurer himself testified on this point as follows (p. 30):

> "Q. You simply sent the money down there without saying a word about it? A. The money was in the bank and I continued those accounts just as they were when I took charge of the office. . . . .
>
> "Q. Did you in any communication with the defendant in this case, verbally or in writing, notify them of the character of the fund, whether Educational or otherwise? A. When I first opened the office?
>
> "Q. At any time? A. No."

All that was shown was that there had been a "balance due on each day from the 5th of June to the 6th of November, 1907, in the aforesaid account, 'George A. Steel, State Treasurer, Educational'"; that prior to August 21st, 1907, "the cash on hand of the Title Guarantee and Trust Company always exceeded the balance due from it on the said account;" that on and after said date the cash on hand was less than "enough to pay the balance to the credit of said account," and that on November 6th the deficiency in cash amounted to $274,882.73, but "that on no other day was the difference aforesaid so large as on the 6th of November, 1907" (p. 26–27). There was no evidence that the Title Guarantee and Trust Company was actually insolvent at any time prior to the appointment of the receiver on November 6th. In fact, it had ample assets to give abundant security to the state treasurer on October 29th (pp. 33–35), and for all that appears had a demand been made by the state treasurer prior to November 6th, 1907, the money would have

been readily raised by the sale or pledge of the very securities which the state treasurer had theretofore accepted as satisfactory and legal security. The only demand ever made by the state treasurer for payment of any part of the fund in question was six days after the appointment of a receiver of the Trust Company by the United States circuit court under an order of that court commanding such receiver "to take immediate possession of all its properties, assets and effects, *and directing the defendants to turn over and deliver to him all of the same and also all property, books, vouchers, papers and documents of all kinds in their possession belonging to the Title Guarantee and Trust Company*" (p. 23), as well as enjoining the officers and directors from interfering with such assets (see appendix, p. 16). The receiver qualified and took possession November 6th (pp. 23, 27). It was proved that the plaintiff-in-error had never personally received any money belonging to the State of Oregon (p. 27). After the receiver had taken possession and after the United States court had compelled all the properties, assets and effects to be turned over to such receiver and had enjoined any interference therewith, and on November 12th the written demand quoted at p. 31, *supra*, was made for the first time by the state treasurer (pp. 27–28).[1]

The record certifies that the above is "a full and complete statement of all of the evidence offered and received on the subject of conversion, and that except as aforesaid there was no evidence offered on the trial of the said cause to show the conversion of the moneys described and referred to in the information" (p. 28).

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[1] See supra, p. 33.

It necessarily follows that the defendant was held guilty of criminal conversion under section 1807 above quoted and the act of 1907 because the Title Guarantee and Trust Company did not on demand pay the deposit of the state treasurer credited to the educational account, notwithstanding the fact that abundant security had been given to the State and that no demand was made until six days after the United States court had through its receiver taken possession of all the properties, assets and effects of the Trust Company and enjoined the defendant from interfering therewith. That such demand was an essential part of the proof of crime cannot be doubted in view of of the information which charged that the funds in question were "to be returned by the said defendants to the said State and to the legal custodians of said money upon legal demand therefor" (p. 2), and of the instructions of the trial court to the jury (p. 48).

But if it be argued, contrary to the allegations of the information and the charge to the jury, that the gist of the offense under the act of 1907 was not the refusal to pay on demand, but the commingling of the educational funds with other deposits, as held by the appellate court (p. 106), the complete answer must be that no such acts are prohibited and no such criminal offense is created by the act of 1907 or any other statute.

As to the alleged offense of commingling the educational funds with the other deposits or banking funds of the Trust Company, it must be borne in mind that no specific money was ever deposited by the state treasurer. He simply forwarded checks from time to time "for credit of Geo. A. Steel, State Treasurer, Educational," and "in each case

credit was given on the books of the Title Guarantee and Trust Company for the checks so forwarded for deposit in the said account" (pp. 24–25). Stated in other words, there was done exactly what he directed, that is, a transfer of credit from an account to another, and there was no deposit at any time of specific money for safe-keeping as in a safe deposit vault or as a bailment. The record furthermore certifies (pp. 25–26) that "there was no evidence to show that there was in fact any segregation of money, checks, drafts or evidences of indebtedness representing the deposit of the said Educational Funds or any agreement or understanding that there should be such segregation except as aforesaid."

As to the alleged offense of using part of the state educational funds in the general banking business, it need only be pointed out that neither the act of 1907 nor any other statute provided that deposits of any particular state fund should be segregated or treated as a trust fund or bailment of specific moneys.

It is, moreover, fit and proper to emphasize, as indeed was conceded by the court below (p. 63), that there is no suggestion that the plaintiff-in-error, J. Thorburn Ross, was guilty of personal misconduct or that he was not a banker in the highest and best repute. His integrity and innocence were virtually conceded. It was proved that he had not personally touched a dollar of the state funds in question (p. 27), and there is not even a scintilla of evidence that he had personal knowledge of the source of the moneys deposited by the state treasurer. Furthermore, he was not shown to have had anything to do with the use or disposition of the banking funds of the Trust

Company, nor any knowledge thereof except such as might be attributable to him because he was a director and the president of the Trust Company. The company did much business besides banking (p. 23), and his activities may well have been centered upon such other business. The court below held that criminal intent was not an element of the alleged offense (p. 64), and subsequently so certified to the Governor of Oregon in explaining its decision in the certificates printed in the appendix to this brief (pp. 19–21).

Counsel recognize that the propriety of now submitting these certificates to the court may be doubtful. They have concluded, however, that it is their duty to do so. It may be that they can be properly referred to as explaining the opinions of the court below and as showing the theory of the conviction. They are public records certified by the Governor of the State (appendix, p. 21) and presumably authorized by the state practice. If such explanations of the decision had been made in a subsequent and independent case, it would plainly then be the duty of counsel to submit them for the consideration of this court in order to elucidate and make clear and certain what the opinion in the record might seem to leave vague and ambiguous.

In these certificates to the Governor of Oregon, the judges of the court below certified as follows (appendix, p. 19):

> "Having been asked for an expression of opinion on the application of J. Thorburn Ross for a pardon, we can state that an examination of the evidence brought up on appeal in his case shows no moral turpitude. In the management of the funds deposited with him by the state treasurer, he seems to have acted on the belief that a prior decision of this

court construed the law as upholding the right, generally, to deposit the educational funds of the state in any bank therein. The decision of that case reasonably justified the construction then placed upon it by Mr. Ross, but in the opinion of a majority of the court at the trial of his cause, it was determined that the law respecting this point was changed by the Act of 1907, holding that a criminal intent was not an element of the alleged offense."

And Mr. Justice King added to this (p. 21):

"I am also of the opinion [and was] at the time of the recording of my dissent that it was not the intention of subsequent Acts to abrogate the rule announced in Baker vs. Williams Banking Company, reported in 42nd Oregon, 213, under which rule Mr. Ross, by advice of his counsel, claimed to be acting; and if correct in the assumption, to hold him guilty of a crime under the decision affirming his conviction, is, so far as the practical facts thereof are concerned, *ex post facto* in character."

V.

JURISDICTION IS AN ESSENTIAL ELEMENT OF DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT.

The criminal charge in the case at bar was prosecuted upon an information which the district attorney of the Fourth Judicial District of Oregon filed in March, 1908 (pp. 2–3), as authorized by a statutory provision then in force providing for prosecutions for any crime upon information without indictment by a grand jury (sec. 1258, B. & C. Code, printed in appendix, p. 16). Pending this prosecution, the constitution of the State was amended so as to provide in part as follows:[1]

"No person shall be charged in any circuit court with the commission of any crime or misdemeanor defined or made punishable by any laws of this State, except upon an indictment found by a grand jury."

[1] § 18, Art. VII as amended, appendix, p. 2.

The plaintiff-in-error insisted below that, as this constitutional amendment contained no saving clause covering pending charges, it necessarily operated to deprive the state court of jurisdiction to proceed further with the present charge, and that a prosecution without jurisdiction would be lacking in an essential element of due process of law as guaranteed to every person by the Fourteenth Amendment.

It is the well settled rule of law in Oregon, as well as in other States, that if such a constitutional or statutory provision contains no saving clause, it impliedly repeals any existing provision in conflict therewith and operates to deprive the court of authority to proceed further except in due conformity with the new rule.

The learned court below overruled the point on the authority of its recent decision in *State* v. *JuNun*, 53 Ore. 1, and held that the constitutional provision did not affect the right to proceed because, in its opinion, the amendment was prospective and not retrospective in its operation. By means of this sort of reasoning, as candidly conceded in the brief filed on behalf of the State (p. 102), "the Supreme Court wrote into the amendment by construction a saving clause, the effect of which is exactly the same as if the amendment had specifically excepted from its operation all pending cases." But on behalf of the plaintiff-in-error it is insisted that the court had no power to write any such saving clause into a constitutional amendment.

In the *JuNun* case the court stated the law as follows (53 Ore. at p. 8):

"It is settled that the repeal of a law conferring

jurisdiction takes away all right to proceed, under the repealing statute, as to all actions, suits or proceedings pending at the time of the repeal, unless there is a saving clause in the repealing statute, and this is so in an appellate as well as the court of original jurisdiction. 1 Lewis, Sutherland's Statutory Construction 553, 554; *Ex parte McCardle*, 7 Wall. 506 (19 L. Ed. 464); *Insurance Co.* v. *Ritchie*, 5 Wall. 541 (18 L. Ed. 540); *Sherman* v. *Grinnell*, 123 U. S. 679 (8 Sup. Ct. 260: 31 L. Ed. 278); *Keller* v. *State*, 12 Md. 322 (71 Am. Dec. 596); *State* v. *Allen*, 14 Wash. 103 (44 Pac. 121); *Mahoney* v. *State*, 5 Wyo. 520 (42 Pac. 13: 63 Am. St. Rep. 64); *Aaron* v. *State*, 40 Ala. 307; *Higginbotham* v. *State*, 19 Fla. 557."

The plaintiff-in-error did not contend below that the constitutional provision was retrospective, but, on the contrary, he urged that it was prospective, and that being so it operated from the date of its going into effect to take away all right thereafter to proceed with any pending charge not founded upon an indictment. Nor was it contemplated, in making this contention, that, if sustained, it would secure to the plaintiff-in-error immunity from further prosecution or deprive the State of any further power to press the charge. The statute of limitations, in criminal cases of this character is three years in Oregon, and it had not yet run, and the State was, therefore, free to apply for an indictment.

An examination of the leading authorities upon the point will show that none of them proceeds upon the theory that such a constitutional or statutory provision as the one in question operates in a criminal case other than prospectively when it deprives the court of all right to proceed further under the pre-existing law. *Commonwealth* v. *Duane*, 1 Binney 601; *State* v. *Daley*, 29 Conn. 272, 278–279; *Hartung* v. *The People*, 22 N. Y. 95, 99–103,

and cases there cited; *Commonwealth* v. *Kimball*, 21 Pickering 373, 375–377; *Montague* v. *State*, 54 Maryland 481; *Kenyon* v. *State*, 31 Tex. Cr. 13; *People* v. *Tisdale*, 57 California 104; *State* v. *Mason*, 108 Indiana 48; *Howard* v. *State*, 5 Indiana 183; *State* v. *Ingersoll*, 17 Wisconsin 651; *State* v. *King*, 12 La. Ann. 593, 594, 595; *State* v. *Allen*, 14 Washington 103, 105; *Keller* v. *State*, 12 Maryland 322, 325–327. Hence, the learned court below was as clearly in error, as it was certainly illogical, when it held that, because the amendment was prospective, it did not apply to this pending case. The error which the court inadvertently fell into is not merely one of interpretation or construction of language, but of the legal effect of an unambiguous constitutional provision.

The State, however, contends in the brief filed on its behalf (p. 102) that the declaration of its Supreme Court that the constitutional provision does not apply to pending charges is conclusive and that "this court is bound to adopt the interpretation of the amendment given by the Supreme Court of Oregon." We emphatically challenge the soundness of this contention, and we assert that where the language of a constitutional provision is plain and unambiguous and there is, therefore, no room for interpretation or construction, this court is not bound by any arbitrary declaration of the state court as to the legal effect of the provision. The inquiry whether a state court has or has not jurisdiction always presents an essentially federal question under the Fourteenth Amendment, and this court is called upon to decide this question for itself without being bound by any hard-and-fast rule of comity to follow blindly the decision of the

state court, although such decision professes to interpret or construe a constitutional or statutory provision of the State. Due process of law requires that the court which assumes to determine the rights of parties shall have jurisdiction, and the declaration of the state court that it has jurisdiction is, of course, not binding and conclusive upon this court. *Twining* v. *New Jersey*, 211 U. S. 78, 110; *Scott* v. *McNeal*, 154 U. S. 34, 46.

It is important to bear in mind that, as authorized by the Oregon constitution,[1] the constitutional amendment in question had been duly proposed by initiative petition filed with the Secretary of State on January 29th, 1908, and had been pending for more than a month when the information in the case at bar was filed on March 6th, 1908. The law then in force provided for both indictments and informations; but there was at the time a well-known and profound popular dissatisfaction with the practice of prosecutions upon informations at the discretion and whim of district attorneys, and the people seemed determined to secure for themselves one of the ancient privileges and immunities of our race, namely, that no one should be charged with an infamous crime except after and upon an indictment of a grand jury. *Ex parte Bain*, 121 U. S. 1, 11, 12; *State* v. *Kingsly*, 10 Mont. 537, 547. The people adopted the amendment on June 1st, 1908, and it went into effect immediately. *Bradley* v. *Union Bridge and Construction Co.*, 185 Fed. 544. They then presumably knew perfectly well that there were pending charges against the plaintiff-in-error and others based upon informations filed by district attorneys. When the amendment was voted on

[1] § 1, Art. IV.

and took effect this cause was still pending in the circuit court, and the record, or transcript on appeal as it is called, was not filed in the Supreme Court of Oregon until July 30th, 1908 (p. 52). Under the law of Oregon, a cause is still pending in the circuit court, which alone has jurisdiction, and is not removed to the appellate court, until the filing of the transcript on appeal in the latter court (Lord's Oregon Laws, § 554).

The constitutional amendment above quoted was adopted by the people three days after the plaintiff-in-error was sentenced, and while, to repeat, the cause was still pending in the circuit court. He was being prosecuted upon a charge based upon an information filed by a district attorney, and he had just been convicted and sentenced to imprisonment for five years in the penitentiary and to a fine of $576,853.74, with a provision for his imprisonment for one day for every two dollars of fine unless the fine was sooner paid, in other words, for 288,426 days, which meant practically 790 years! There can be little doubt that the community must have been shocked by the gross injustice of such a cruel and unusual sentence, which meant imprisonment for life unless the prisoner at the bar was rich enough to be able to pay an exorbitant and unjustifiable fine of $576,000. No wonder that the people of the State voted to put an end to charges and prosecutions based upon informations filed by district attorneys in response perhaps to partisan or public clamor. The case at bar undoubtedly was in their minds when they voted for the amendment, and it must be presumed that they knew that the adoption of such a constitutional provision in conflict with a pre-existing statute operated *ipso facto* to deprive

the courts of jurisdiction to proceed further in respect of any pending charge under any such statute. But even if this particular case were not presumably in the minds of the people of the State of Oregon when they adopted the constitutional amendment, the rule would be the same. In the language of Chief Justice Marshall in the famous *Dartmouth College* case, 4 Wheat. 518, 644:

> "It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception."

It is true that the learned court below said in the *Ju Nun* case that "the constitutional amendment in question did not in terms repeal the law [of 1899] conferring jurisdiction upon the courts to hear and determine causes in which a defendant had been accused of a crime by information filed by a district attorney prior to the adoption, and we do not think it does by implication."[1] But surely if there be an irrefragable proposition in American constitutional law it is that any pre-existing constitutional or statutory provision in conflict with a later *constitutional amendment* is necessarily repealed thereby. Such, indeed, is the law of Oregon as declared by its Supreme Court in *State* v. *Langworthy*, 55 Ore. 303, 309, and *State* v. *Schluer*, 59 Ore. 18, 28. Although, of course, there may be instances, we should be surprised to find any constitution

[1] *State* v. *Ju Nun*, 53 Ore. 1, at p. 8.

or constitutional amendment which contained such a superfluous and wholly unnecessary declaration repealing every statutory provision in conflict with it. If the statute of 1899 conferring jurisdiction on the Oregon courts to entertain charges based upon informations was repealed for any purpose, and that is indisputable and conceded, it was certainly repealed for all; if repealed in respect of future charges, it was likewise repealed in respect of pending charges so far as concerned further proceedings thereunder. Moreover, if the people of Oregon had intended that the constitutional amendment should not apply to pending prosecutions, no reason has been suggested why they did not use perfectly simple and obvious language declaring their intention. As Chief Justice Marshall said in *Gibbons* v. *Ogden*, 9 Wheat. 1, 188: "Men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey."

The question whether plaintiff-in-error was accorded due process of law under the Fourteenth Amendment, is one involving the Constitution of the United States, and this court is free and under the duty to exercise its own independent judgment in the decision thereof. There are presented for its consideration only two questions: (1) What is the legal effect of the plain and unambiguous amendment of the Oregon constitution quoted above? (2) Is an indictment, *when required by the state constitution*, an essential part of due process of law against one whom it is sought to deprive of his liberty because of an alleged crime?

If the language of the Oregon constitution is to be construed according to the meaning of the words used, which is

the established rule of construction, it must be clear that the constitutional amendment refers not to the mere formal mode of making the first charge or instituting a prosecution, but to *the jurisdictional basis upon which shall rest the charge made at all stages of the proceeding*, and that the intention was to forbid any assertion of a criminal charge at any stage of a criminal proceeding, after the amendment went into effect, unless such charge was based "*upon indictment found by a grand jury.*" If this be so, every step in the present prosecution which was taken in the circuit court and subsequently in the appellate court after the constitutional amendment was adopted, was a proceeding otherwise than in accordance with due process of law and constituted a violation of the constitutional rights of the plaintiff in error according to the system of law established in his State. A person continues to be "charged with" crime even after conviction and while the case is pending on appeal. Certainly a jury cannot convict him of a crime with which he is not "charged" at the time when they bring in their verdict, and certainly an appellate court cannot affirm a conviction unless the accused is still duly charged with crime. In several extradition cases, for example, the courts have held that a person remains "charged with" crime, within the meaning of those words in the Federal Constitution, even after conviction and the termination of judicial proceedings against him. *Drinkall* v. *Spiegel*, 68 Conn. 441, 447; *Matter of Hope*, 7 N. Y. Crim. Rep. 406, 408. See also *Ex parte Bergman* (Tex. Cr. App.), 130 S. W. 174, 178.

If the courts have thus held that a person is still charged

with crime after all judicial proceedings against him have terminated, *a fortiori* it would seem beyond dispute that one is charged with crime during the entire course of the pendency of the court proceedings against him according to the local procedure. And since the constitution of Oregon expressly provides that this continuing charge shall be "upon indictment," it seems to us impossible to escape the conclusion that the plaintiff-in-error was denied his constitutional rights when the Supreme Court of Oregon, after the adoption of the constitutional amendment, allowed a charge based, not upon an indictment found by a grand jury, but upon a mere information, to be further pressed against him.

While it is, of course, settled, as was decided in *Hurtado* v. *California*, 110 U. S. 516, that a State may provide for a criminal charge upon information, without contravening the provision of the Fourteenth Amendment against depriving persons of their liberty without due process of law, it would seem clear that the right to be exempt from being charged with crime except upon indictment, *when guaranteed by the state constitution*, is of so substantial a nature that an indictment is a necessary element of jurisdiction and hence of due process of law. It is settled that when the constitution or a statute of a State requires that a prosecution for a particular offense shall be based upon an indictment, the requirement is jurisdictional, and "without such indictment the court acquires no jurisdiction." *United States* v. *London*, 176 Fed. Rep. 976, 979; *Garnsey* v. *State*, 4 Okla. Cr. 547, 563; *Ex parte Wilson*, 114 U. S. 417, 429; *Ex parte Bain*, 121 U. S. 1, 12, 13.

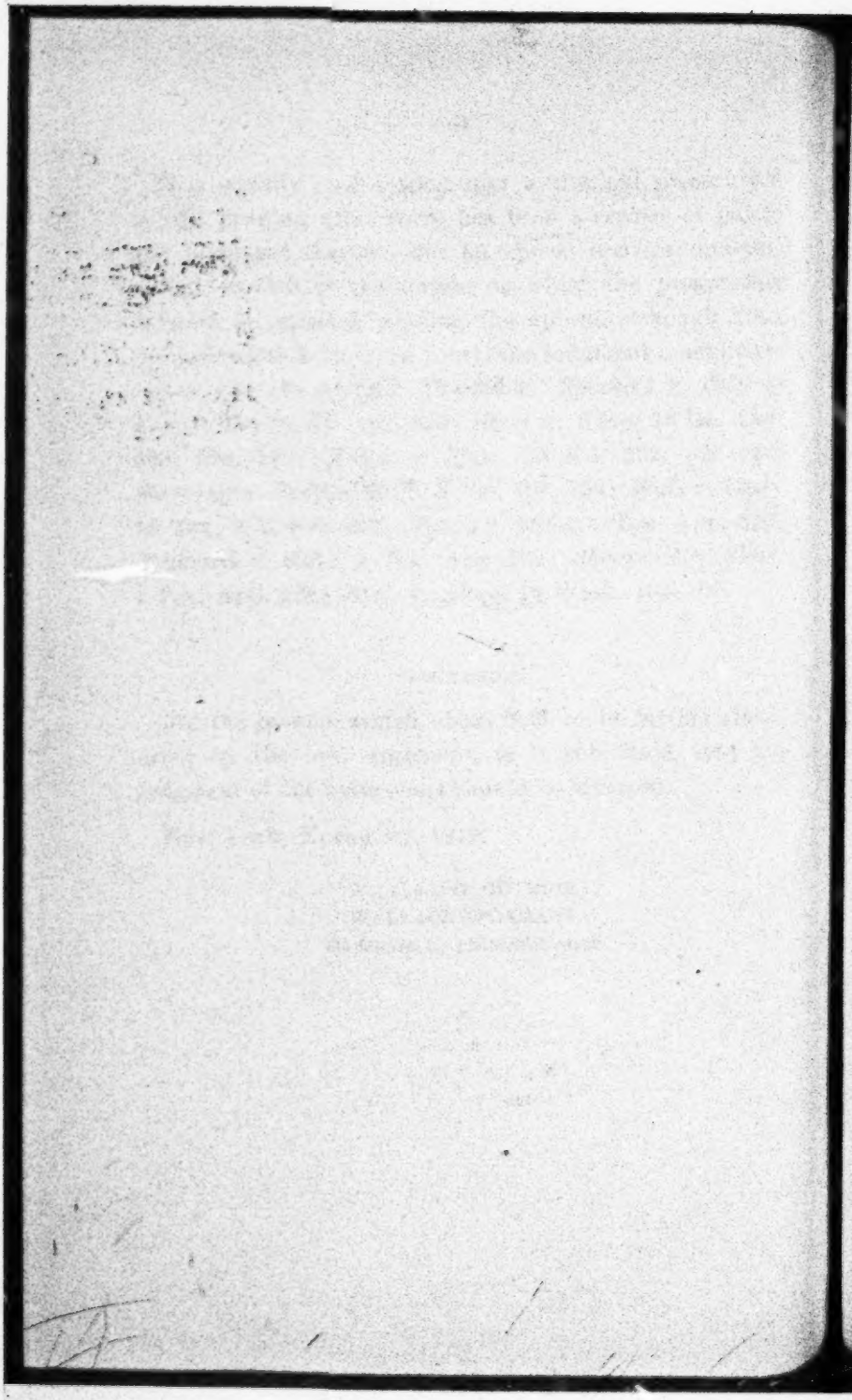
It is equally well settled that a criminal prosecution is still pending after there has been a verdict of guilty and judgment thereon, but an appeal remains undetermined, so that if the statute on which the prosecution is based is repealed pending the appeal, although after the judgment in the trial court, the judgment must be reversed and the accused dismissed. *Speckert* v. *City of Louisville*, 78 Ky. 287, 289; *State* v. *King*, 12 La. Ann. 593, 594, 595; *Keller* v. *State*, 12 Md. 322, 325–327; *Hartung* v. *People*, 22 N. Y. 95, 108, 109; *Wall* v. *State*, 18 Tex. 682, 696, 697; *Tuton* v. *State*, 4 Tex. App. 472; *Hubbard* v. *State*, 2 Tex. App. 506; *Sheppard* v. *State*, 1 Tex. App. 522; *State* v. *Allen*, 14 Wash. 103, 105.

CONCLUSION.

For the reasons stated above and to be further elaborated on the oral argument, it is submitted that the judgment of the state court should be reversed.

New York, November, 1912.

WILLIAM D. GUTHRIE,
WALLACE McCAMANT,
Of counsel for plaintiff-in-error.



DEC 6 1912
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1912. No. 75.

J. THORBURN ROSS, Plaintiff-in-error,

v.

THE STATE OF OREGON.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

REPLY BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR.

WILLIAM D. GUTHRIE,
WALLACE McCAMANT,
Of counsel for plaintiff-in-error.

Supreme Court of the United States,

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THE STATE OF OREGON.

Error to the Supreme Court of the State of Oregon.

REPLY BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR.

I.

A number of authorities are cited on behalf of the State of Oregon to sustain its contention that "the construction given to a statute or constitution of the State by the highest court of such State is regarded as part of the statute or constitution, and is as binding as the text upon the Supreme Court of the United States." This statement is too broad a generalization, and, as is so often the case with generalizations, error lurks in it. As Mr. Justice Holmes said, dissenting in *Hyde* v. *United States*, 225 U. S. 347, 391:

> "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."

This court has not yet declared that a plainly erroneous and arbitrary construction by a state court as to the *legal operation* and *effect* of unambiguous language contained in a state statute or constitution is conclusive upon it

in a case involving federal rights, privileges, or immunities. Otherwise, it would be abdicating its function, refusing in practical effect the protection intended to be guaranteed to the individual by the Constitution of the United States, and disregarding the command of Article VI that the provisions of the National Constitution "shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." In *Scott* v. *McNeal*, 154 U. S. 34, 45, Mr. Justice Gray said:

> "Upon a writ of error to review the judgment of the highest court of a State upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the Territory, or of the State, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another State. In every such case, this court must decide for itself the true construction of the statute. *Huntington* v. *Attrill*, 146 U. S. 657, 683, 684; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 492, 495."

And in *Houston and Texas Central Rd. Co.* v. *Texas*, 177 U. S. 66, 77, Mr. Justice Peckham said:

> "Upon these facts this court has jurisdiction, and it is its duty to determine for itself the existence, construction and validity of the alleged contract, and also to determine whether, as construed by this court, it has been impaired by any subsequent state legislation to which effect has been given by the court below. *Bridge Proprietors* v. *Hoboken Company*, 1 Wall. 116; *University* v. *People*, 99 U. S. 309; *Fisk* v. *Jefferson Police Jury*, 116 U. S. 131; *New Orleans*

Water Works Company v. *Louisiana Sugar Refining Company*, 125 U. S. 18; *Central Land Company* v. *Laidley*, 159 U. S. 103, 109; *Bacon* v. *Texas*, 163 U. S. 207, 216; *McCullough* v. *Virginia*, 172 U. S. 102."

This latter decision, together with the cases cited therein, was approved in *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 147, Mr. Justice White writing the opinion of the court.[1]

It is, therefore, confidently asserted that the construction of the state court as to the *legal effect and operation* of the act of 1907 and of the constitutional amendment of 1908 is not conclusive upon this court. *Ballard* v. *Hunter*, 204 U. S. 241, 259–260. In such a case as stated in Bishop's Written Laws at sec. 191:

> "When the meaning of a statute of any sort is plain on its face, it can be extended or shortened by the courts only *in its effect*. They are not justified in interpreting what needs no interpretation; their duty is simply to carry out the expressed legislative purpose and intent."

Finally, as Mr. Justice Johnson said long ago for this court in *Polk's Lessee* v. *Wendell*, 5 Wheat. 293, 306, speaking of an arbitrary and unreasonable decision of a state court:

> "We will respect the decisions of the state tribunals, but there are limits which no court can transcend."

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[1] There are a number of essays and articles upon the subject of the effect of state decisions, of which the most instructive probably are those of Professor Thayer, 4 Harvard Law Rev. 311; Thayer's Legal Essays, 187; Mr. Hornblower in 14 Am. Law Rev. 321, and Mr. Bates in 23 ib. 189. See also Mr. Pepper's monograph entitled "The Border Land of Federal and State Decisions," p. 17, and Professor Gray's Nature and Sources of the Law," in both of which the doctrine of *Swift* v. *Tyson*, 16 Pet. 1, is criticised.

II.

In support of the contention that the plaintiff-in-error was justified in reposing upon the decision of the highest court of Oregon in the case of *Baker* v. *Williams Banking Company*, 42 Ore. 213, as declaring and fixing the law, the attention of the court should be called to the civil case of *Harris* v. *Jex*, 55 N. Y. 421, 424, in which the court said:

> "The plaintiff had a right to repose upon the decision of the highest judicial tribunal in the land. It was, as applied to the relations between these parties and to this case, the law, and not the mere evidence of the law."

And in *Olcott* v. *The Supervisors*, 16 Wall. 678, 690, Mr. Justice Strong said:

> "Parties have a right to contract, and they do contract in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule."

If this be true of civil cases involving merely contract or property rights, *a fortiori* must it be the sound rule in criminal cases where the life or liberty of the citizen may be at stake.

One of the orders issued by Lord Chancellor Bacon declares that a change of decision should not prejudice the individual. It reads as follows:

> "No decree shall be made upon pretense of equity against an act of Parliament. Nevertheless, if the construction of such an act of Parliament hath for a time gone one way in general opinion and reputation, and after by later judgment hath been controlled, then relief may be given upon the matter of equity for cases arising before the said judgment, because the subject was in no default."

III.

A further consideration of common law crimes and of the light in which the framers of the Constitution of the United States in 1787 used the phrase "*ex post facto* law" will be most persuasive, if indeed it will not be found convincing. It is, of course, the settled rule that the Constitution has "the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States," and that "any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day" (Chief Justice Taney in *Dred Scott* v. *Sandford*, 19 How. 393, 426, quoted with approval in the opinion of the court in *South Carolina* v. *United States*, 199 U. S. 437, at p. 449).

There can be no reasonable doubt that Dr. Paley's Principles of Moral and Political Philosophy, which had been published in 1785, were in the hands of the members of the Constitutional Convention. To one of the writers of this brief it has always seemed that the credit for the adoption of the principle of the separation of governmental powers, and especially the separation of the judicial from the legislative power, ought to be attributed to Dr. Paley rather than to Mont[illegible]ieu.[1] Two of Dr. Paley's chapters in Book VI a[illegible]ost instructive, viz., No. VIII treating "of the administration of justice" and No. IX treating "of crimes and punishments." Extracts will show that he certainly recognized that the decisions of the cour[illegible]s

[1] Mr. Justice Story in his Commentaries on the Constitution quotes from Dr. Paley's work in a note to section 1344.

"would be so many laws." Thus in chapter VIII we find the following language:

> "The first maxim of a free state is, that the laws be made by one set of men, and administered by another; in other words, that the legislative and judicial characters be kept separate. When these offices are united in the same person or assembly, particular laws are made for particular cases, springing oftentimes from partial motives, and directed to private ends: whilst they are kept separate, general laws are made by one body of men, without foreseeing whom they may affect; and, when made, must be applied by the other, let them affect whom they will.
>
> "For the sake of illustration let it be supposed, in this country, either that, parliaments being laid aside, the courts of Westminster Hall made their own laws; or that the two houses of parliament, with the king at their head, tried and decided causes at their bar: it is evident, in the first place, that the decisions of such a judicature would be so many laws; and, in the second place, that, when the parties and the interests to be affected by the laws were known, the inclinations of the law-makers would inevitably attach on one side or the other; and that where there were neither any fixed rules to regulate their determinations, nor any superior power to control their proceedings, these inclinations would interfere with the integrity of public justice. The consequence of which must be, that the subjects of such a constitution would live either without any constant laws, that is, without any known pre-established rules of adjudication whatever; or under laws made for particular persons, and partaking of the contradictions and inquity of the motives to which they owed their origin."

In 1822, Edward Livingston presented to the legislature of Louisiana his famous Report on the Plan of a Penal Code. He was the contemporary of the framers of the Constitution of the United States, and he certainly under-

stood as well as any one then living the subject of criminal law and the intent and purpose of the clause prohibiting *ex post facto* laws. Referring to the system of criminal law existing in England and the American Colonies at the close of the eighteenth century, he used the following language (Works of Edward Livingston, Chase's ed. 1872, vol. 1, p. 12):

> "No proportion was preserved between crimes and punishments. The cutting of a twig, and the assassination of a parent; breaking a fish-pond, and poisoning a whole family or murdering them in their sleep, all incurred the same penalties; and two hundred different actions, many not deserving the name of offences, were punishable by death. This dreadful list was increased by the legislation of the judges, who declared acts which were not criminal under the letter of the law to be punishable by virtue of its spirit. The statute gave the text, and the tribunals wrote the commentary in letters of blood; and extended its penalties by the creation of constructive offenses. The vague, and sometimes unintelligible language, employed in the penal statutes; and the discordant opinions of elementary writers, gave a colour of necessity to this assumption of power; and the English nation have submitted to the legislation of its courts, and seen their fellow subjects hanged for constructive felonies; quartered for constructive treasons; and roasted alive for constructive heresies, with a patience that would be astonishing, even if their written laws had sanctioned the butchery. The first constructive extension of a penal statute beyond its letter, is an ex post facto law, as regards the offense to which it is applied; and is an illegal assumption of legislative power, so far as it establishes a rule for future decisions. In our republic, where the different departments of government are constitutionally forbidden to interfere with each other's functions, the exercise of this power would be particularly dangerous; it was therefore thought

proper to forbid it by an express prohibition. Some actions, injurious to society, may, by this means, be permitted for a time, but it was deemed infinitely better to submit to this temporary inconvenience, than to allow the exercise of a power so much at war with the principles of our government. It may be proper to observe that the fear of these consequences is not ideal, and that the decisions of all tribunals, under the common law, justify the belief, that without some legislative restraint, our courts would not be more scrupulous than those of other countries, in sanctioning this dangerous abuse."

And in his Introductory Report to the System of Penal Law, Livingston said (Id., p. 170):

"What the law forbids, is an offence; but the law cannot forbid without being perfectly intelligible, 'incertam si vocem det tuba, qui se parabit ad pugnam?—incertam si vocem det lex, qui se parabit ad parendum?' The trumpet may sound forever, but no one prepares for battle unless the appointed signal be given. The laws may speak, but can never be obeyed unless they are understood. An ambiguous penal law, is no law; and judicial decisions cannot explain it without usurping authority which does not belong to them. To extend the law to a case that does not come within the plain meaning of its words, is to make a new law. Nothing, it appears, can be clearer than the reasoning which shows this."[1]

As is well known, at the time the Constitution of the United States was framed, there was very little statute law

[1] The authority of Edward Livingston as one of the great jurists of the world is indisputable. In England, in France, in Germany, and we believe in other countries, the above mentioned reports are constantly cited as authority. La Législation Criminelle de Livingston has long been a standard work on criminal law in France. Macaulay repeatedly acknowledges his debt to these reports and speaks of Livingston as "high authority" in connection with the Indian Penal Code (Notes on Indian Penal Code). Indeed, it is not an exaggeration to say that the genius and spirit of this American jurist inspired much of the Indian Penal Code that now rules a population far greater than our own.

in the United States (see Gray's Nature and Sources of the Law, sec. 534), and those who then spoke of the laws of a State undoubtedly had in mind the common and unwritten law evidenced only by the decisions of judges and the judgments of courts. The large majority of the offenses denominated criminal and punishable as such in 1787 were common-law crimes which had not been created or defined by statute. Whatever was in the opinion of the judges malicious or a nuisance or *contra bonos mores* was an indictable offense. 1 Wharton Crim. Law, 10th ed., sec. 29. We find in 1812 a prosecution for a common-law crime in Massachusetts (*Commonwealth* v. *Silsbee*, 9 Mass. 417); in 1825 a similar prosecution in Virginia (*Commonwealth* v. *Callaghan*, 2 Va. Cas. 460); in 1829 in Connecticut (*State* v. *Doud*, 7 Conn. 384); in 1857 in Missouri (*State* v. *Appling*, 25 Mo. 315); as late as 1892 in Maine (*State* v. *Jackson*, 78 Me. 91; *State* v. *Holt*, 84 Me. 509); and in New York common-law crimes were not finally abolished until December 1, 1882 (*The People* v. *Sadler*, 97 N. Y. 146).

It is submitted that it would be illogical and unreasonable now to assume that the jurists and publicists who framed the Constitution and the Judiciary Act of 1789 did not regard as *laws* those rules of the common law which were being enunciated and established by judges, and that they did not intend the word "law" or "laws" to include unwritten as well as written laws, as those terms were then understood. Indeed, most of the rules of constitutional law, all the rules of construction, all the rules of equity jurisprudence, nearly all the rules of evidence, were then judge-made laws, and innumerable authorities might be

cited recognizing judicial decisions as sources of the common or unwritten law. As Mellish, L. J., said in *Allen* v. *Jackson*, L. R. 1 Ch. Div. 399, 405:

> "The Vice-Chancellor, in giving his judgment in this case, not unnaturally said that he would be making a new law if he held that this gift over was good. I should be sorry to contravene that rule, as far as it is properly applicable, although I may observe that the whole of the rules of equity, and nine-tenths of the rules of common law, have in fact been made by the Judges."

Moreover, when the Constitutional Convention convened in Philadelphia, an edition of Glanville had recently been published, viz., Prologus Tractatus de Legibus et Consuetidinibus regni Angliæ, ed. 1780, London, and this clearly showed that as early as the twelfth century the decisions of the courts were regarded as "laws." In Beames' translation (see Beale's ed., Washington, 1900, pp. xxxvii to xxxix), Glanville's language is rendered as follows:

> "For the English Laws, although not written, may as it should seem, and that without any absurdity, be termed Laws, (since this itself is a Law—that which pleases the Prince has the force of Law) I mean, those Laws which it is evident were promulgated by the advice of the Nobles and the authority of the Prince, concerning doubts to be settled in their Assembly. For, if from the mere want of writing only, they should not be considered as Laws, then, unquestionably, writing would seem to confer more authority upon Laws themselves, than either the Equity of the persons constituting, or the reason of those framing, them. But, to reduce in every instance the Laws and Constitutions of the Realm into writing, would be, in our times, absolutely impossible, as well on account of the ignorance of writers, as of the confused multiplicity of the Laws."

IV.

The State of Oregon contends that "the construction of the state court that a statute under which a person has been convicted is prospective only will be followed in the federal court on the question whether or not the statute is an *ex post facto* law." In support of this proposition the case of *Jaehne* v. *New York*, 128 U. S. 190, is cited. But this case only holds that a statute may be void as to past and valid as to future offenses, which is not at all the question now before the court. The contention of the plaintiff-in-error is not that the constitutional amendment of 1908 is retroactive, but that from and after the time it took effect on June 1, 1908, all existing statutory provisions in conflict with its terms were repealed, and that thereafter there was no legal authority or jurisdiction to proceed further with the charge against him "except upon an indictment found by a grand jury." This question is to be decided, as fully to all intents and purposes, as if the constitutional amendment had said on its face that all statutes in conflict therewith were repealed. The settled doctrine universally applicable to instruments of writing, and especially to constitutions and constitutional amendments, is that whatever is implied is as much a part of the instrument or constitutional provision as what is expressed. *Ex parte Yarbrough*, 110 U. S. 651, 658; *South Carolina* v. *United States*, 199 U. S. 437, 451. If, therefore, the necessary legal effect of the amendment of 1908 to the Oregon Constitution (which amendment was duly initiated before the filing of the information in this case and which became effective while the case was still pending in the

court of original jurisdiction) was to repeal all conflicting statutory provisions, or, stated in other language but expressing the same idea, if what is implied is as much a part of the constitutional amendment as what is expressed, then it necessarily follows that the statute authorizing prosecutions under informations charging persons with the commission of crime was as much repealed as if the constitutional amendment had expressly so declared.

Moreover, the court will not fail to observe that the State concedes that the statute authorizing prosecutions under informations was impliedly repealed, but argues that it was only repealed prospectively as of and from the date it actually took effect. This argument, however, only begs the question. If the statute was repealed as of and from the 1st of June, 1908, which is conceded, there was thereafter no jurisdiction "in any circuit court" to proceed with any charge "except upon an indictment found by a grand jury."

The question of constitutional law thus presented is not one of the construction of an ambiguous or doubtful statute, or of any language requiring interpretation or construction, but whether the state court was not necessarily deprived of jurisdiction to proceed further when it appeared that the statute under which the prosecution was instituted by information and under which the court acquired and was exercising jurisdiction, had been repealed pending the prosecution of the charge.

V.

It is fit and proper to emphasize that there never was a time in the history of our political and constitutional

institutions when it was more necessary than now for the protection of individual liberty that the federal courts should hold, as they were constrained to hold under the Fourteenth Amendment, that the judicial departments of the States are restrained from passing *ex post facto* laws to the same extent and for the same reasons as are the legislative departments. We are on the threshold of a great experiment in pure democracy and of an attempt to break down the independence of the judges, At the very time this case was being tried, the people of Oregon were amending their constitution so as to provide for the recall of all public officials, including their judges. The provision for the recall of judges (Art. II, sec. 18) now in force was pending when this case was tried in the court of original jurisdiction, and was in force throughout all the proceedings in the appellate court. It provides that on the petition of only twenty-five per cent. of the voters a justice of the Supreme Court may be subjected to an election to decide upon his recall. If a judge resigns after the filing of a petition against him, his resignation is accepted *ipso facto*, but if he does not resign within five days after the petition is filed, then twenty days thereafter a special election must be held to determine his fate. The judge sought to be recalled is allowed only 200 words in his justification. Other candidates for the judicial office may be nominated to be voted for at the same time, and the candidate receiving the highest vote gets the office. What probability was there under such a system of the impartial administration of justice if public interest or public clamor demanded the sacrifice of the well-to-do or the punishment of a bank

officer for a failure brought about through causes quite beyond his control? We have nowhere seen a stronger warning against the recall of judges than in John Stuart Mill's work on Representative Government, published half a century ago, where he said:

> "If a judge could be removed from office by a popular vote, whoever was desirous of supplanting him would make capital for that purpose out of all his judicial decisions; would carry all of them, as far as he found practicable, by irregular appeal before a public opinion wholly incompetent, for want of having heard the case, or from having heard it without either the precautions or the impartiality belonging to a judicial hearing; would play upon popular passion and prejudice where they existed, and take pains to arouse them where they did not. And in this, if the case were interesting, and he took sufficient trouble, he would infallibly be successful, unless the judge or his friends descended into the arena, and made equally powerful appeals on the other side. Judges would end by feeling that they risked their office upon every decision they gave in a case susceptible of general interest, and that it was less essential for them to consider what decision was just, than what would be most applauded by the public, or would least admit of insidious misrepresentation."

CONCLUSION.

For the reasons above stated and those contained in the main brief already filed on behalf of the plaintiff-in-error, it is submitted that justice requires that the judgment of the state court should be reversed.

Washington, December 6, 1912.

WILLIAM D. GUTHRIE,
WALLACE McCAMANT,
Of counsel for plaintiff-in-error.

NOV 23 1912

Supreme Court of the United States,

OCTOBER TERM, 1912. No. 75.

J. THORBURN ROSS, Plaintiff-in-error,

v.

THE STATE OF OREGON.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

APPENDIX TO BRIEF OF PLAINTIFF-IN-ERROR.

NOVEMBER, 1912.

WILLIAM D. GUTHRIE,
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Of counsel for plaintiff-in-error.

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PROVISIONS OF CONSTITUTION OF OREGON.

ARTICLE VIII[1].

Section 2. *Common School Fund.* The proceeds of all the lands which have been, or hereafter may be, granted to this state, for educational purposes (excepting the lands heretofore granted to aid in the establishment of a university), all the moneys and clear proceeds of all property which may accrue to the state by escheat or forfeiture; all moneys which may be paid as exemption from military duty; the proceeds of all gifts, devises, and bequests, made by any person to the state for common school purposes; the proceeds of all property granted to the state, when the purposes of such grant shall not be stated; all the proceeds of the five hundred thousand acres of land to which this state is entitled by the provisions of an act of Congress, entitled "An act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights, approved September 4, 1841," and also the five per centum of the net proceeds of the sales of the public lands, to which this state shall become entitled on her admission into the union (if congress shall consent to such appropriation of the two grants last mentioned) shall be set apart as a separate and irreducible fund to be called the common school fund, the interest of which, together with all other revenues derived from the school land mentioned in this section, shall be exclusively applied to the support and maintenance of common schools in each school district, and the purchase of suitable libraries and apparatus therefor.

Section 5. *Sale of School Lands.* The governor, secretary of state, and state treasurer shall constitute a board of commissioners for the sale of school and university

[1] Bellinger and Cotton's Codes and Statutes of Oregon, pp. 55 and 56. This is an official publication (L. 1901, p. 119, §§ 1, 2 and 7; B. & C. Code, p. iv), and it is ordinarily cited in the Oregon reports as "B. & C. Code" or "B. & C. Comp."

lands, and for the investment of the funds arising therefrom, and their powers and duties shall be such as may be prescribed by law: Provided, That no part of the university funds, or the interest arising therefrom, shall be expended until the period of ten years from the adoption of this constitution, unless the same shall be otherwise disposed of by the consent of congress for common school purposes.

Article IV.[1]

Section 20. *Subject and title of act.* Every act shall embrace but one subject, and matters properly connected therewith, which subjects shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title.

Section 28. *When act to take effect.* No act shall take effect until ninety days from the end of the session at which the same shall have passed, except in case of emergency; which emergency shall be declared in the preamble or in the body of the law.

Article VII.[2]

Section 18. *Jurors, who shall be grand jurors.* The legislative assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors; and out of the whole number in attendance at the court, seven shall be chosen by lot as grand jurors, five of whom must concur to find an indictment. No person shall be charged in any circuit court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this state, except upon indictment found by a grand jury; *provided, however*, that any district attorney may file an amended indictment whenever an indictment has, by a ruling of the court, been held to be defective in form.

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[1] Bellinger and Cotton's Code, pp. 41 and 44.

[2] Lord's Oregon Laws, p. 111. In June, 1908, section 18 of Article VII of the constitution of Oregon was amended to read as above.

STATE LAND BOARD.

Laws of 1899, sections 2 and 3, p. 157 (Bellinger & Cotton's Code, sections 3295 and 3296).

State Land Board, how Constituted—may use a Seal. The governor, secretary of state, and treasurer, as a board of commissioners for the sale of school and university lands and for the investment of the funds arising therefrom, shall be styled the "state land board," and such board shall have power and is hereby authorized to use a common seal, and the secretary of state shall procure such seal for said board.

Clerk of State Land Board, Duties of. * * * * * * * * * * * * * * to receive, receipt for, and make immediate payment to the state treasurer of all moneys of the state for the sale of lands or payable to the board on any of the loans authorized by this act, taking his receipt therefor, specifying the particular fund to which such moneys belong, and whether received as principal or interest, and to perform such other duties and acts as the board may direct.

DUTIES OF STATE TREASURER.

Section 2410 of Bellinger & Cotton's Code.

It shall be the duty of the treasurer,—

1. To keep, in books provided for that purpose, fair, full, and separate accounts of all moneys received by him; also a cash book, in which shall be entered a detailed account of all moneys by him received and disbursed, a transcript of which shall be furnished the secretary of state semiannually;

2. To pay, on demand, out of the state treasury, all sums authorized by law to be so paid, if there are appropriate funds in the treasury to pay the same, and when any such sum is required to be paid out of a particular fund, it shall be paid out of such fund only; and he shall pay no fund out of the treasury except in pursuance of law authorizing the payment thereof; but when any claim or account is authorized by law to be paid out of a general or contingent appropriation, the same shall be paid by the treasurer upon the warrant of the secretary of state;

3. To pay all warrants drawn on the treasurer in the order in which they are presented, out of the appropriate funds; if there are no such funds in the treasury, then he shall endorse on such warrants "not paid for want of funds," together with the date; and all warrants so endorsed shall draw legal interest from and after such endorsement;

4. To give receipts for all moneys paid to him, which before their delivery, shall be presented to the secretary of state, who shall countersign the same and enter them in his books to the credit of the county officer or person making the payment, and charge the same to the treasurer;

5. To permit the books, papers, and transactions of his office to be open at all times to the inspection of the governor, secretary of state, the legislature, or any committee of either branch thereof, to examine the same;

6. To deliver over to his successor in office all moneys, books, papers, furniture, and other effects belonging to or preserved in his office;

7. He shall perform all other duties imposed upon him by law.

Section 2408 of Bellinger & Cotton's Code.

State Treasurer, Office where kept—Custodian of state funds. The state treasurer shall keep his office at the seat of government; shall receive and have charge of all moneys paid into the state treasury, and shall pay out the same as directed by law.

STATUTE CREATING AND DEFINING CRIME OF LARCENY OF PUBLIC MONEY.

Laws of 1864, section 554 of An Act to provide a code of criminal procedure, and to define crimes and their punishment. (Bellinger & Cotton's Code, section 1807.)

If any person shall receive any money whatever for this state, or for any county, town, or other municipal or public corporation therein, or shall have in his possession any money whatever belonging to such state, county, town, or corporation, or in which such state, county, town, or corporation has an interest, and shall in any way convert to his own use any portion thereof, or shall loan, with or with-

out interest, any portion thereof, or shall neglect or refuse to pay over any portion thereof, as by law directed and required, or when lawfully demanded so to do, such person shall be deemed guilty of larceny, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than one nor more than fifteen years, and by fine equal to twice the amount so converted, loaned, or neglected, or refused to be paid, as the case may be.[1]

EDUCATIONAL APPROPRIATIONS

Laws of 1901, p. 15, section 1 (Bellinger & Cotton's Code, section 3529).

Permanent Appropriations.—The sum of forty-seven thousand five hundred dollars, or so much thereof as may be necessary, be and the same is hereby appropriated annually for the support and maintenance of the University of Oregon, and to keep the buildings, grounds, and other property thereof in repair, and for the construction of buildings and additions to the library and laboratory facilities; and it is hereby made the duty of the governor, secretary of state, and state treasurer, or other proper state officers, each year, in computing and estimating the amount of revenue necessary for state purposes, to include in such estimate the sum hereby appropriated; and it shall be levied and collected as other state taxes are collected, and paid into the state treasury and kept separate and apart from other funds, and shall be known as "the university fund."

Laws of 1901, p. 13, section 2 (Bellinger & Cotton's Code, section 3541).

Continuing Fund Provided.—In computing the amount of revenue necessary for state purposes, the governor, secretary of state, and state treasurer, acting jointly, shall, in each year, at the time they compute the amount of revenue necessary for other state purposes, also compute the sum of twenty-five thousand dollars for the annual support and benefit of the State Agricultural College, which shall be levied and collected in the same manner as other taxes for state purposes are levied and col-

[1] In force unamended since 1864.

lected; and the fund arising therefrom shall be paid into the state treasury and kept separate from other funds, and shall be known as the "state agricultural college fund." This fund shall be paid out only on warrants drawn by the secretary of state on the state treasurer against said fund. This fund shall be a continuing fund, and if the amount raised in any year shall not be used for current expenses, etc., as herein provided during that year, the balance remaining in the hands of the treasurer shall be carried over to the next year and added to the fund for that year.

LAWS OF 1907, ch. 117, p. 206.[1]

AN ACT

Providing for the acquisition, classification, management, control, leasing, sale and disposition by the State of Oregon of all lands inuring to said State from any and all sources, and for the management and investment of the moneys arising therefrom, constituting all necessary officers therefor, specifying their duties and salaries, and giving them full powers for the performance thereof, protecting said lands from trespass and injury, providing penalties for the enforcement of the provisions of this act, and repealing Chapters 2 and 3 of Title XXXII of Bellinger and Cotton's Annotated Codes and Statutes of Oregon, relating to public lands, an act entitled "An act providing for the selection of indemnity school land, and governing the sale of the same, and fixing the price thereof," approved February 24, 1903, an act entitled "An act to amend section 3298 of Bellinger and Cotton's Annotated Codes and Statutes of Oregon," approved February 18, 1905, and an act entitled "An act to authorize and provide for the investment of the surplus of the irreducible school fund, university fund, or agricultural college fund, held by the State Land Board, and to authorize the said land board to make such investments," approved February 12, 1903.

Section 36. The irreducible school fund of this State shall be composed of the proceeds of the sales of the sixteenth and thirty-sixth section of every township of this State, or of any lands selected in lieu thereof; all the moneys and clear proceeds of all property which may accrue to the State by escheat or forfeiture; all moneys which may be paid as exemption from military duty; the proceeds of all gifts, devises and bequests made by any person to the State for common school purposes; the proceeds of all property granted to the State when the purpose of such grant shall not be stated; all proceeds of the sale of tide and overflow lands, and all the proceeds of

[1] Filed February 23, 1907, and taking effect May 24, 1907 (constitution, Art. IV, sec. 28).

the sale of the five hundred thousand acres of land to which this State is entitled by an act of Congress approved September 4, 1841, and all lands selected for capitol building purposes under act of Congress approved February 14, 1859; and all the proceeds as aforesaid shall be set apart as a separate and irreducible fund, to be called the "Irreducible School Fund," the interest of which shall be exclusively applied to the support and maintenance of common schools in each school district in this State; *provided, however*, that all lawful claims for repayment of moneys out of escheated estates and for attorneys' fees and all other expenses in any suit or proceeding relating to escheated estates shall be audited by the State Land Board and paid from said fund principal.

Section 37. All moneys belonging to the irreducible school fund, university fund, or agricultural college fund, shall be loaned by the State Land Board at six per cent. per annum, interest payable semi-annually on the first day of January and the first day of July of each year; *provided, however*, that if at any time there be a surplus of either of these funds over and above all loans applied for, the State Land Board may, in its discretion, invest such portion of said surplus, as in their judgment they may deem proper, in bonds issued by school districts in the State of Oregon, the legality of such bonds to be approved by the Attorney-General.

LAWS OF 1907, ch. 135, page 248.[1]

AN ACT

To secure to the state interest on state moneys, to provide depositories for state funds; defining the duties of the state treasurer in relation thereto; prescribing the security to be given and providing for the approval thereof.

Be it enacted by the People of the State of Oregon:

Section 1. It shall be the duty of the state treasurer, on the first Monday in June of each year, to designate such banks and trust companies within this state, as he may, under the provisions of this act, deem eligible to be made state depositories for the purpose of receiving on deposit funds of this state, and paying out the same on order or checks of the state treasurer.

[1] Filed February 25, 1907, and taking effect May 26, 1907 (constitution, Art IV, sec. 28).

Section 2. All banks and trust companies applying to be made state depositories under the provisions of this act, shall, on or before the first Monday in June of each year, file their application in writing with the state treasurer, said application to be accompanied with a sworn statement of the financial condition of said bank or trust company, at time application is made. The state treasurer shall pass upon all applications made in compliance with this act, and shall stamp upon the application "Approved," or "Rejected," and the same shall be duly signed by him. Any and all applications stamped "Approved," and signed by the state treasurer as herein provided, shall be deemed eligible to be made state depositories under the provisions of this act.

Section 3. The state treasurer shall deposit, and at all times keep on deposit in national banks doing business in the state of Oregon, or other banks and trust companies doing business within this state, as shall have been approved under the provisions of this act as herein provided, the amount of money in his hands belonging to the several funds in the state treasury, and any such bank or trust company may file with the state treasurer its application for the privilege of keeping on deposit such funds or some part thereof. All such deposits shall be subject to payment when demanded by the state treasurer on his check, and any bank receiving and holding any such deposit as aforesaid shall be required to pay and shall pay to the state for the privilege of holding the same, interest at the rate prescribed by the state treasurer as hereinafter provided, which rate of interest shall be not less than two per cent. per annum and subject also to such regulations as are imposed by law and the rules adopted by the state treasurer for receiving and holding such deposits; *provided,* that the state treasurer may retain on hand in the state vault or in his control as such treasurer a sum not to exceed $100,000 as a reserve for the purpose of paying therefrom the current obligations and appropriations of the state. The state treasurer shall annually on the last day of June, or when said day shall fall on Sunday, then on the next day preceding, fix the rate of interest to be paid on such deposits, which shall be not less than the

rate hereinbefore in this act established, and which rate when so established shall not be changed for such period of one year.

Section 4. The amount to be paid by any and all depositories under the provisions of this act, for the privilege of keeping such public funds on deposit, shall be computed on the average daily balance of the public moneys kept on deposit therewith, and shall be credited and paid to the state quarterly on the first day of January, April, July, and October of each year, and such depository shall, quarterly, on the days aforesaid, render a statement in duplicate to the treasurer and secretary of state showing the amounts credited.

The treasurer shall require, and it is hereby made the duty of every such depository to keep accurate accounts of all such moneys deposited with it, showing the amount deposited, and when deposited, and to render at the beginning of each and every month, to the treasurer and secretary of state, a statement, in duplicate, showing the daily balance of the state moneys held by it during the month next preceding, and the interest thereon, and all sums paid to the state for the privilege of keeping said moneys on deposit as aforesaid shall be credited by the treasurer to the general fund.

Section 5. For the security of funds so deposited under the provisions of this act, the state treasurer shall require all such depositories to deposit securities of the kind and character hereinafter described, or to give bonds for the payment of such deposits and the interest thereon. Said bonds, when given, shall run to the state of Oregon, and, together with the securities offered, are to be approved as to the legal form by the attorney-general. Said bonds shall be conditioned that the depository shall at the beginning of each and every month render to the treasurer and secretary of state a statement in duplicate, showing the daily balance and the amount of money of the state held by it during the month preceding, and the amount of the interest thereon and for the payment of said deposit and interest thereon, as hereinbefore provided, when demanded by the state treasurer on his check at any time, and generally to do and perform whatever may be required by the provi-

sions of the act and a faithful discharge of the trust reposed in such depository; *provided,* that no personal bonds shall be accepted. The bond provided for under this act shall be a surety company bond and shall be in substance as follows:

KNOW ALL MEN BY THESE PRESENTS: That_____ as principal and _____ Surety Company, surety, are held and firmly bound unto the state of Oregon in the sum of_____ dollars, for the payment of which, well and truly to be made, we hereby bind ourselves, our successors and assigns (or as the case may be) firmly by these presents.

Dated the_____day of_____, A. D.____.

Whereas, the said principal, the_____Bank of _____has applied for a part of the current funds in the state treasury of the state of Oregon to be deposited in said bank, the amount whereof shall be subject to withdrawal or diminution by said treasurer as the requirements of the state shall demand, and which amount may be increased as the said treasurer may determine; and, whereas, the said bank, in consideration of such deposit and for the privilege of keeping the same, has agreed to pay the state of Oregon interest on such sum at a rate not less than two (2) per cent. per annum on the amount of said deposit, the same to be credited and paid quarterly upon the daily average of such amount as the said bank shall have on deposit for the quarter, or any fraction thereof, next preceding the crediting or payment of said interest, which interest shall be computed and accredited to the account of the state and shall become thenceforth a part of such deposit.

Now, therefore, if said_____Bank of_____ shall at the beginning of each and every month, render to the state treasurer and secretary of state a statement, in duplicate, showing the daily balance of the state moneys held by it during the month next preceding, and the interest thereon, and shall well and truly keep all said sums of money so deposited, or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of the state treasurer as aforesaid, and shall pay over the same, and

any part thereof, upon the check or written demand of the state treasurer, and to his successor in office as shall be by him demanded, and shall calculate, credit, and pay said interest as aforesaid, and shall in all respects, save and keep the state of Oregon and said state treasurer harmless, and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be void and of no effect, otherwise to be and to remain in full force and virtue.

Witness our hands and seals the day and year first above written.

_____ [SEAL] _____ [SEAL]

_____ [SEAL] _____ [SEAL]

_____ [SEAL] _____ [SEAL]

All bonds and securities, after approval, shall be deposited with and held by the treasurer. It shall be the duty of the attorney-general to enter and prosecute to final determination all suits for the recovery of any penalty arising under the conditions of any bond required to be given by the provisions of this act.

Section 6. The state treasurer may designate a bank or trust company in the City of Salem or a bank or trust company in the city of Portland as an active depository for the collection of any drafts, checks, certificates of deposit and coupons that may be received by him on account of any claim due the state.

Section 7. The bank or trust company, designated as such active depository, shall be required to give security to the state to be approved by the state treasurer for the prompt collection of all drafts, checks, certificates of deposit, or coupons that may be delivered to such active depository by the state treasurer for collection; also, for the safe-keeping and prompt payment on the state treasurer's order of the proceeds of all such collections; also for the payment of all drafts that may be issued by said state treasurer by such active depositary.

Section 8. The state treasurer, on receipt of any draft, check, or certificate of deposit, on account of state dues, may place the same in such active depositary for collection, and it shall be the duty of such active depositary to collect the same without delay, without charge for its

services for such collection, or for exchange, and to notify the state treasurer when collected. The compensation to be paid by such active depository shall be fixed by the state treasurer upon the best terms obtainable for the state.

Section 9. The word "bonds," wherever used in this act, shall be held to include bonds furnished by surety companies authorized and qualified to do business in this state. The word "security" or "securities" shall be construed to include United States bonds, bonds of the state of Oregon and those for which it is ultimately liable, bonds of the several counties, cities, villages, towns, and school districts of this state, warrants of the state of Oregon and of the several counties thereof on the current expense fund. No securities shall be approved unless their market value shall equal their par or face value. Upon payment to the state of the deposits and accrued interest for which security was given, it shall be returned to the bank furnishing the same, and when such securities can be conveniently segregated, the amount thereof may be, in the discretion of the state treasurer, reduced in proportion as such deposits shall be reduced or repaid to the state.

Section 10. The state treasurer may cause an investigation to be made at any time to ascertain the sufficiency of any bank or security offered or given under this act, and to require new or additional security whenever in his judgment the safety of any deposit of state moneys under this act requires it; and such deposit shall be withdrawn unless such new or additional security be given. Any expense incurred in carrying out the provisions of this act shall be audited by the secretary of state and paid out of the general fund of the state. The state treasurer shall not be liable personally or upon his official bond for any moneys that may be lost by reason of the failure or insolvency of any bank which becomes a depository under this act.

Section 11. The making of profit, directly or indirectly, by the state treasurer, out of any money in the state treasury, belonging to the state, the custody of which the state treasurer is charged with, by loaning or otherwise using it, or the removal by the state treasurer or by

his consent, of such moneys, or a part thereof, out of the vault or safe of the treasurer's department, or out of any legal depository of such moneys, except for the payment of sums authorized by law to be paid, or for the purpose of depositing the same under the provisions of this act, in banks which shall have qualified as depositories, shall constitute a felony, and on conviction thereof, shall subject the treasurer to imprisonment in the state penitentiary for a term not exceeding two years or a fine not exceeding five thousand dollars ($5,000), or by both such fine and imprisonment, and the treasurer shall be liable upon his official bond for all profits realized from such unlawful use of such funds.

Section 12. If the treasurer willfully fail or refuse at any time to do or perform any act required of him by this act, he shall be guilty of a misdemeanor, and, upon conviction thereof, he shall be sentenced to pay a fine of not exceeding five thousand dollars ($5,000).

Section 13. The offering, or giving, directly or indirectly, by any bank or depository, or by any officer or stockholder thereof, or by any other person or persons in its or their behalf, or by its or their knowledge, acquiescence or authority, or in its or their interest to the state treasurer, of any gift, compensation, reward or inducement with the intent or for the purpose of inducing said treasurer to deposit funds of the state in any bank, contrary to any law of this state, shall constitute a felony, and shall, upon conviction thereof, subject the party or parties offending to imprisonment in the state penitentiary for a period not exceeding two years or by a fine not exceeding five thousand dollars ($5,000), or by both such fine and imprisonment.

Section 14. The state treasurer is hereby authorized and empowered to sell any and all of the bonds, warrants and other securities that may be deposited as security for the deposit of any state funds in any depository under this act, at public or private sale, whenever there shall be a failure or refusal upon the part of any such bank, as a depository, to pay over the said funds or any part thereof upon the check or demand of the treasurer made upon such bank. Notice of the sale of such bonds, warrants or other securities, under this act, shall be given

for a period of thirty days, in a newspaper published in the city of Salem, Oregon, and when the sale thereof is made by the state treasurer, either at public or private sale, under this act, and such bonds, warrants or other securities, have been transferred by the state treasurer, the absolute ownership of such bonds, warrants and other securities rests in the purchaser or purchasers, upon the payment of the purchase money to the state treasurer and upon filing a duplicate receipt therefor with the secretary of state. Should there be any surplus after paying the amount to the state, and expenses of sale, it shall be paid over to the bank making the deposit.

Section 15. In the event all the funds of the state are not applied for by approved depositories under the provisions of this act, the state treasurer is authorized in his discretion to deposit the funds not so applied for and remaining in his hands, in some solvent bank or banks, trust company or trust companies, upon the best terms obtainable.

Section 16. The word "funds" used in this act shall apply to all funds in the state treasury except the common school, agricultural college, and university funds. Nothing in this act shall be construed to deprive the State Land Board of the power to invest or dispose of the funds derived from the sale of public lands as is now or may be provided by law.

Section 17. Whenever the state treasurer, in furnishing the bond required from him by law, shall furnish a bond executed by a surety company legally authorized to transact business in this state, and such bond shall be approved by the governor, the state shall pay the premium for such bond, not to exceed one-third of one per cent. per annum of the penalty named in the bond so executed and approved.

Whenever a person employed in the office of the state treasurer, required by him to furnish a bond, shall furnish a bond executed by a surety company legally authorized to transact business in this state, and such bond shall be approved by the state treasurer, the state shall pay the premium for such bond, not to exceed one-third of one per cent. per annum of the penalty named in the bond so executed and approved.

Section 18. For the purpose of carrying out the provisions of this act, there is hereby appropriated annually from any moneys in the state treasury, not otherwise appropriated, the sum of $1,200.

Section 19. All acts and parts of acts in conflict herewith are hereby repealed.

JUDICIAL NOTICE.

Sections 719 and 720 of Bellinger & Cotton's Code.

Certain Facts Assumed to be True. There are certain facts of such general notoriety that they are assumed to be already known to the court. Of those facts evidence need not be produced.

Facts Judicially Noticed. The following facts are assumed to be thus known:

1. The true significance of all English words and phrases, and all legal expressions;
2. Whatever is established by law;
3. Public and private official acts of the legislative, executive, and judicial departments of this state and of the United States.
4. The seals of all the courts of this state, and of the United States;
5. The accession to office, and the official signatures and seals of office of the principal officers of government in the legislative, executive, and judicial departments of this state, and of the United States;
6. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States;
7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public;
8. The laws of nature, the measure of time, and the geographical divisions and political history of the world.

In all these cases, the court may resort for its aid to appropriate books or documents of reference.

STATUTE AUTHORIZING THE PROSECUTION OF CRIMES BY INFORMATION.

Section 1258 of Bellinger & Cotton's Code.

District Attorneys Required to Prosecute all Crimes by information. Hereafter it shall be lawful for the district attorney of any judicial district of this state, and it is hereby made his duty, to file, in the proper circuit court, an information charging any person or persons with the commission of any crime defined and made punishable by any of the laws of this state, and which shall have been committed in the county where the information is filed.

ORDER OF NOVEMBER 6, 1907, APPOINTING RECEIVER AND ENJOINING DEFENDANTS.[1]

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

No. 8309.

N. Coy, Complainant,
vs.
The Title Guarantee & Trust Company, a corporation, J. Thorborn Ross, George H. Hill, T. T. Burkhart, John E. Aitchison, and F. M. Warren, Defendants.

November 6, 1907.

Now at this time comes the plaintiff in the above entitled suit by Joseph Simon, his Solicitor, and also come the Defendants, The Title Guarantee & Trust Company, a corporation, J. Thorborn Ross, George H. Hill, T. T. Burkhart and John E. Aitchison, by Wm. A. Munly, their Solicitor, and thereupon comes on for hearing the application of the Complainant for the appointment of a Receiver of all the property and assets of the Defendant, The Title Guarantee & Trust Company, described and referred to in the said

[1]This order was offered in evidence upon the trial of the defendant Ross and is now inserted in the record upon consent of counsel in order to avoid the necessity of applying for a writ of certiorari to supply the omission.

Bill of Complaint and which said Bill of Complaint has been duly verified, and the Defendants last above named, and each of them, duly appearing upon this application by their Solicitor, and consenting to the appointment of a Receiver as prayed for by the Complainant, and the matter having been argued by counsel and considered by the Court, the Court being now fully advised in the premises.

It is Now Here Considered, Ordered, Adjudged and Decreed that George H. Hill of the City of Portland, be and he is hereby appointed Receiver of all and singular the property, real, personal and mixed, belonging to the Defendant, The Title Guarantee & Trust Company described and referred to in the Bill of Complaint in this suit, and that the said Receiver be and he is hereby authorized and directed to take immediate possession of all and singular the properties, assets and effects belonging to or in which the said Defendant, The Title Guarantee & Trust Company is in any wise interested, and that the said Receiver shall maintain, care for and protect the said property and pay and discharge such public duties, taxes and assessments thereon as may be lawfully required and continue the operation and management and care of the said property and for such purposes, or any of them, to employ such agents, attorneys, and employees as may be necessary and solely out of the income or proceeds of said property make such payments or disbursements as may be necessary for the foregoing purposes or any of them.

It Is Further Ordered that the said Receiver within five days file with the Clerk of this Court a bond with surety or sureties to be approved by the Judge of this Court in the penal sum of $100,000, conditioned for the faithful performance of his duties as such Receiver, and to account for all funds to come into his hands as this Court shall direct.

It Is Further Considered, Ordered, Adjudged and Decreed that the Defendants and each of them and each and every officer, director, agent, employee of the said The Title Guarantee & Trust Company turn over and deliver to the said Receiver, or his duly constituted representative, any and all property, books of accounts, vouchers, deeds, leases, contracts, moneys, bonds, bills, stocks or other obligations, or property of every name and nature in his

or their hands or under his or their control belonging to the Defendant, The Title Guarantee & Trust Company, and each and every of said officers, agents, employees are hereby commanded and required to obey and perform such orders and directions as may from time to time be given to them by the said Receiver, or his duly constituted representative in the conducting and operation of said business and caring for said property and discharging his duties as such Receiver.

It Is Further Ordered and Adjudged that the said defendant corporation, its officers, agents and servants, or other persons, be and they are hereby enjoined and restrained during the continuance of this suit from selling, transferring or disposing of any property of the said Defendant corporation, or from interfering in any manner whatever with the possession or management of said property over which the said Receiver is appointed, or from interfering in any manner to prevent the discharge of his duties or the operation or conduct of the business of the Defendant corporation under the order of this Court.

The said Receiver is authorized to operate and conduct and manage and care for the business and property of said corporation in such manner as will in his judgment produce most satisfactory results, to enable him to wind up the business, and he is further authorized and directed to collect and receive all the income therefrom and all the debts and demands due said Defendant corporation of all kinds and for such purpose he is hereby vested with power to employ, and discharge and fix the compensation of such officers, agents, attorneys and employees as are or shall be necessary in the discharge of his duties. Said Receiver is further authorized and empowered to institute and prosecute actions and suits which may be necessary in his judgment for the proper protection of the property confided to him and likewise to defend all such actions or proceedings that may be instituted against him as such Receiver or against his Defendant corporation.

It Is Further Ordered that the said Receiver shall make and file with the Clerk of this Court within thirty days an inventory of all the property and effects of the Defendant corporation that may come into his possession or control; That said receiver shall also file with the Clerk of this

Court monthly statements of account showing the amount received and disbursed by him in the operation of the property placed in his hands hereby, and said Receiver shall deposit such moneys in the First National Bank of Portland, which is hereby designated as the depository for such purposes.

CHAS. E. WOLVERTON,
Judge.

Filed November 6, 1907, J. A. Sladen, Clerk U. S. Circuit Court for the District of Oregon.

CERTIFICATES OF JUDGES.

STATE OF OREGON
SUPREME COURT
Salem.

December 31st, 1910.

To the Governor
of the State of Oregon,

DEAR SIR:

Having been asked for an expression of opinion on the application of J. Thorburn Ross for a pardon, we can state that an examination of the evidence brought up on appeal in his case shows no moral turpitude. In the management of the funds deposited with him by the state treasurer, he seems to have acted on the belief that a prior decision of this court construed the law as upholding the right, generally, to deposit the educational funds of the state in any bank therein. The decision of that case reasonably justified the construction then placed upon it by Mr. Ross, but in the opinion of a majority of the court at the trial of his cause, it was determined that the law respecting this point was changed by the Act of 1907, holding that a criminal intent was not an element of the alleged offense.

Yours very respectfully,
(Signed) FRANK A. MOORE,
ROBERT EAKIN,
THOMAS A. MCBRIDE,
W. T. SLATER.

SALEM, OREGON, January 4, 1911.

Hon. JAY BOWERMAN,
Acting Governor,
Salem, Oregon.

MY DEAR SIR:

Replying to your recent letter of inquiry concerning the advisability of exercising executive clemency in behalf of Mr. J. Thorburn Ross, I have to say:

My conclusions respecting the legality of the conviction of Mr. Ross appear in my dissenting opinion filed in that case, to which I still adhere. I did not, however, give in detail my reasons for the conclusions reached, as the time at my command did not permit me to do so.

Among my reasons for reaching a different conclusion from that of my associates were, that while there is apparent conflict between sections 8 and 16 of the Act of 1907, the former section clearly implies that the funds, regardless of the class of moneys deposited, could be commingled with other funds on deposit without violating the intent of the Act, and that any other construction would necessitate the elimination of section 8 or 16, and violates the rule of construction to the effect that all sections of an Act should be construed, if practicable, so that each may stand. Construed under this rule, I took it that it was the intent of the law to permit this class of deposits to be used as other funds on deposit, the State requiring for its protection the giving of ample security, as was done in this instance. The depository of this fund was required to collect and account to the State for all moneys paid to the State for the common school fund, such as interest on loans, etc.

Section 8 of the Act provided that the State Treasurer should fix the compensation to be paid by the depositories for the privilege of receiving the deposits and acting as the receiving and disbursing agent of the State. Under the construction given the Act by the majority of the court, it is manifest that banks were required to pay not only for the privilege of receiving deposits which they could not use, but for the privilege of doing much labor for and in behalf of the State without charge, which I deem inconsistent with the general purport of the Act, especially section 8 thereof.

I am also of the opinion [and was] at the time of the recording of my dissent that it was not the intention of subsequent Acts to abrogate the rule announced in Baker vs. Williams Banking Company, reported in 42nd Oregon, 213, under which rule Mr. Ross, by advice of his counsel, claimed to be acting; and if correct in the assumption, to hold him guilty of a crime under the decision affirming his conviction, is, so far as the practical facts thereof are concerned, *ex post facto* in character.

I am also of the opinion, and was at the time of dissenting, that section 1807 of the statute under which Mr. Ross was convicted, is not applicable to his case. It was evidently intended to apply to persons converting funds for their own use and not to instances of the kind involved in the Ross case where the evidence shows he received no direct benefit from the moneys converted, which conversion, if it may be termed such, was made by a corporation of which he was a member and director, and the moneys used by the institution, as other moneys on hand were, and that section 1807 is not intended to apply to every person who happens to be a director of a corporation, regardless of whether such funds were used directly for them or for their use and benefit.

Entertaining these views, and having reached the conclusion that the proceedings upon which the judgment of conviction was based were, from their inception, illegal, it becomes unnecessary for me to express any opinion as to the justice of exercising executive clemency in Mr. Ross' behalf.

Very truly yours,

WILL R. KING.

STATE OF OREGON.

EXECUTIVE DEPARTMENT.

SALEM, October 5th, 1912.

This is to certify that I, Oswald West, Governor of Oregon, am the legally appointed custodian of all records and documents on file which are or may be placed

of record in the Executive Office of the State of Oregon. I further certify that the attached letter, under date of December 31st, 1910, is a true and correct copy of the original letter now on file in this office in connection with the application of J. Thorburn Ross for executive clemency. I further certify that the letter attached, under date of January 4th, 1911, is a true and correct copy of the original now on file in this office as a part of the record in the above mentioned case. I further certify that these letters and both of them have been by me compared with the original and that each is a verbatim copy of the original and in evidence of this certification, I hereinunder attach my signature on this the 5th day of October, 1912, and have caused the same to be attested by the Secretary of State under seal.

OSWALD WEST,
Governor.

(SEAL)

Attest:
BEN W. OLCOTT,
Secretary of State.

CERTIFICATE OF ACTING TREASURER OF OREGON SHOWING REPAYMENT OF EDUCATIONAL FUNDS DEPOSITED BY THE STATE.[1]

I, Thos. B. Kay, do hereby certify that I am the duly elected, qualified and acting Treasurer of the State of Oregon; and that by virtue of such office I have the custody of the books, accounts and records belonging to the Treasury Department; that the following is a statement of sums received from W. C. Bristol, Attorney for the American Surety Company of New York, on account of re-payment of moneys deposited with the Title Guarantee and Trust Company, Portland, Oregon, Educational

[1] The facts shown in the above certificate are matters of public record of which the Oregon courts could properly take judicial notice under secs. 719 and 720, B. & C. Code, printed *supra*, p. 14. *Burch* v. *Earhart*, 7 Ore. 58, 60, 68, 67.

Account, together with the accrued interest on such moneys, as shown by the books and papers on file in this Department:

DATE.	AMOUNT		HOW APPLIED.
1908.	PRINCIPAL.	INTEREST.	
Oct. 14.	$19,330.92		The Title Guarantee and Trust Co. Educational account.
Oct. 14.		$13,540.04	Interest on $288,426.87, balance in The Title Guarantee and Trust Company, Educational Account, from Nov. 6, 1907, to Oct. 14, 1908, at 5% per annum.
1909.			
Sep. 7.	41,714.58		The Title Guarantee and Trust Co., Educational Account.
Sep. 7.		12,071.94	Interest on $269,095.95, balance in The Title Guarantee and Trust Co., Educational Account, from Oct. 14, 1908, to Sep. 7, 1909, at 5% per annum.
Oct. 15.	2,381.37		The Title Guarantee and Trust Co., Educational Account.
Oct. 15.		1,200.42	Interest on $227,281.37, balance in The Title Guarantee and Trust Co., Educational Account, from Sep. 7, 1909, to Oct. 15, 1909, at 5% per annum.
Oct. 15.		2,375.00	Interest on $225,000.00, balance in The Title Guarantee and Trust Co., Educational Account, from Oct. 15, 1909, to Dec. 31, 1909, at 5% per annum.
1910.			
Jan. 3.	225,000.00		The Title Guarantee and Trust Co., Educational Account.
Totals,	$288,426.87	$29,187.40	

THOS. B. KAY.

Sworn to and subscribed before me a Notary Public this fifth day of January, A. D. 1911.

F. T. WRIGHTMAN,
Notary Public for Oregon.

Supreme Court of the United States,

OCTOBER TERM, 1912. No. 75.

J. THOMPSON BAIN, Plaintiff in error,

v.

THE STATE OF OREGON.

Error to the Supreme Court of the State of Oregon.

SUPPLEMENTAL MEMORANDUM SUBMITTED BY LEAVE OF THE COURT.

I.

In the criminal case of *People* v. *Tompkins*, 195 N. Y. 413, 416, the New York Court of Appeals used the following language in answer to a contention that it should change the existing rule of law as to larceny notwithstanding the fact that it had become a rule of personal liberty:

> "We cannot change the existing rule without enacting, in effect, an *ex post facto* law. This cannot be done without ignoring the constitutional rights of many who may legally claim the protection of the rule. Neither can it be done without judicial usurpation of legislative power."

This case was not cited in our brief because it had not been found indexed or digested under the heading of ex post facto laws.

II.

Macaulay's Report upon the Indian Penal Code was referred to in the reply brief, but, through oversight, the attention of the court was not called to his discussion of the power of making law by means of the power of construing the law. His language is as follows (Works of Lord Macaulay, Edinburgh ed. 1897, vol. 7, pp. 423, 424):

> "That a law, and especially a penal law, should be drawn in words which convey no meaning to the people who are to obey it is an evil. On the other hand, a loosely worded law is no law, and to whatever extent a legislature uses vague expressions, to that extent it abdicates its functions, and resigns the power of making law to the courts of justice. . . . . .
>
> The power of construing the law in cases in which there is any real reason to doubt what the law is amounts to the power of making the law. On this ground the Roman jurists maintained that the office of interpreting the law in doubtful matters necessarily belonged to the legislature. The contrary opinion was censured by them with great force of reason, though in language perhaps too bitter and sarcastic for the gravity of a code. 'Eorum vanam subtilitatem tam risimus quam corrigendam esse censuimus. Si enim in præsenti leges condere soli imperatori concessum est, et leges interpretari solo dignum imperio esse oportet. Quis legum ænigmata solvere et omnibus aperire idoneus esse videbitur nisi is cui legislatorem esse concessum est? Explosis itaque his ridiculosis ambiguitatibus tam conditor quam interpres legum solus imperator juste existimabitur.'"*

Due notice has been given to opposing counsel of the submission to the court of the above references.

New York, December 17, 1912.

WILLIAM D. GUTHRIE,
Of counsel for plaintiff-in-error.

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* Cod. Just., Lib. I., Tit. XIV. 12.

IN

The Supreme Court

of the United States

October Term 1909

J. THORBURN ROSS,
Plaintiff in Error.

vs.

STATE OF OREGON,
Defendant in Error.

Motion to Dismiss Writ of Error and Argument on Motion

Now comes the State of Oregon, the defendant in error, by its counsel, A. M. Crawford, George J. Cameron and Martin L. Pipes, and moves this court to dismiss the writ of error herein for the reason that this court has no jurisdiction of the same, as will fully appear from the record and proceedings made and had in said cause in the Supreme Court of the State of Oregon, the relevant and material parts of which records and proceedings, together

with the laws of the State of Oregon and the decisions of the Supreme Court of the State of Oregon which are pertinent to this cause, are hereto annexed and made a part hereof.

A. M. CRAWFORD,
GEORGE J. CAMERON and
MARTIN L. PIPES,
Attorneys for Defendant in Error.

I.

The plaintiff in error was tried in the Circuit Court of the State of Oregon for Multnomah County on an information filed by the district attorney March 6, 1908, charging him with a violation of Section 1807 of Bellinger & Cotton's Annotated Codes and Statutes of the State of Oregon, which information was in words and figures as follows, to-wit:

In the Circuit Court of the State of Oregon, for Multnomah County.

State of Oregon, Plaintiff, v. J. Thorburn Ross, George H. Hill, John E. Aitchison and T. T. Burkhart, Defendants.	Information C 758.

The defendants, J. Thorburn Ross, George H. Hill, John E. Aitchison and T. T. Burkhart, are accused by the district attorney of the Fourth Ju-

dicial District of the State of Oregon, by this information of the crime of larceny, committed by converting to their own use money in their possession belonging to the State of Oregon, in violation of Section 1807 of Bellinger & Cotton's Annotated Codes and Statutes of the State of Oregon.

That on the 9th day of September, A. D. 1907, in the County of Multnomah and State of Oregon, the Title Guarantee and Trust Company was then and there a corporation organized and existing under the laws of the State of Oregon, and then and there carrying on a banking business and conducting a bank in the state and county aforesaid; that the defendant, J. Thorburn Ross, was then and there the duly elected and acting president and a duly elected and acting director of the said corporation; that the defendant, T. T. Burkhart, was then and there the duly elected and acting treasurer and a duly elected and acting director of the said corporation; that the said George H. Hill was then and there the duly elected and acting vice-president of the said corporation and a duly elected and acting director thereof, and the said John E. Aitchison was then and there a duly elected and acting director of the said corporation; and the said defendants were then and there a majority of the board of directors of said corporation.

That the said defendants, J. Thorburn Ross, George H. Hill, John E. Aitchison and T. T. Burkhart, on the 9th day of September, A. D. 1907, and

in the county and state aforesaid then and there being, and then and there pretending to act for and on behalf of the said the Title Guarantee and Trust Company, did then and there have in their possession and under their control as officers and directors of the said the Title Guarantee and Trust Company as aforesaid, $288,426.87 then and there belonging to the State of Oregon and then and there in the possession and under the control of the said defendants as aforesaid for the said State of Oregon and for safe keeping and to be returned by the said defendants to the said state and to the legal custodian of said money, upon legal demand therefor, the said money being then and there lawful money of the United States of America and bank notes, a more particular description of which is to the district attorney unknown, and then and there of the value of $288,426.87, and which said money then and there belonged to and was a part of the Irreducible School Fund, and of the Agricultural College Fund, and of the University Fund of the said state; the said defendants and each of them then and there well knowing that the said money so belonged to the said state and to the said Irreducible School Fund, and said Agricultural College Fund, and to the said University Fund of the said state as aforesaid; and the said defendants then and there having possession of the said money as aforesaid, belonging to the said state and to the said funds as aforesaid, and for the said state as

aforesaid, and for safe keeping and to be returned to the said state and to the legal custodian of said money, upon legal demand therefor as aforesaid, did then and there wilfully, unlawfully, feloniously and knowingly convert the same to their own use, the said defendants then and there well knowing that the said money so in their possession as aforesaid was then and there money belonging to the State of Oregon, and to the Irreducible School Fund and to the Agricultural College Fund, and to the University Fund of the said state as aforesaid, and which said money the said defendants before the said 9th day of September, A. D. 1907, pretending to act for and on behalf of the said the Title Guarantee and Trust Company, and as officers and directors of the said the Title Guarantee and Trust Company as aforesaid, had received for the State of Oregon, from the said George A. Steel, for the State of Oregon and for safe keeping to be returned by them, the said defendants to the said George A. Steel, as state treasurer, or to his successors in office, and to the State of Oregon the said money at the time it was received as aforesaid belonging to the said State of Oregon and to the Irreducible School Fund and to the University Fund, and to the Agricultural College Fund, of said state, all of which facts the defendants at the time they so received the said money as aforesaid well knew, and the said George A. Steel, being at the time said defendats received said money as aforesaid,

the duly elected and acting treasurer of said State of Oregon and as such treasurer the legal custodian of the said money, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

Dated at the City of Portland, in the county aforesaid, this 6th day of March, A. D. 1908.

Witnesses subpoenaed, sworn and examined by the district attorney and for the State of Oregon.

F. W. FERGUSON,
GEO. BLACK,
GEO. A. STEELE.

JOHN MANNING,
District Attorney of the Fourth Judicial District of the State of Oregon.

"Endorsed."

Filed March 6, 1908.

F. S. FIELDS, Clerk.
By H. C. Smith, Deputy.

II.

The plaintiff in error was convicted upon said information and was sentenced by the said Circuit Court to five years' imprisonment in the state penitentiary and to pay a fine of $576,853.74, and in default of the payment of said fine to be imprisoned in the county jail of Multnomah County one day for each $2 of the fine, not exceeding 288,426 days.

III.

The plaintiff in error appealed from the judgment of conviction and sentence to the Supreme Court of the State of Oregon, which is the highest court of said state, with the result that the Supreme Court affirmed that portion of the sentence imposing imprisonment in the penitentiary for five years, and reversed and set aside the part imposing the fine and imprisonment in the county jail, all of which will appear from the written opinion of the Supreme Court of Oregon in the case of State v. Ross, which opinion is hereinafter set forth.

IV.

The plaintiff in error makes the following assignment of errors in this court, to-wit:

ASSIGNMENT OF ERRORS.

Comes now J. Thorburn Ross, plaintiff in error above named, and respectfully avers and shows in connection with his petition for a writ of error herein from the Supreme Court of the United States to the Supreme Court of the State of Oregon, that in the record, proceedings, decision and final judgment of said Supreme Court of Oregon in the above entitled matter, there is manifest error in this, to-wit:

First. The said Supreme Court of Oregon erred in holding that the amendment of Section 18 of Ar-

ticle VII of the Constitution of the State of Oregon, which became effective June 23, 1908, after the conviction of the plaintiff in error, did not operate to divest the court of jurisdiction to entertain and proceed further with the charge against the plaintiff in error of the commission of a crime defined and made punishable by the laws of the state, such charge being based wholly upon an unsworn information and in the absence of any indictment found by a grand jury, except to reverse and set aside the judgment of conviction based upon such unsworn information, and in not holding that any further prosecution of said charge would deprive the plaintiff in error of liberty without due process of law in conflict with Section 1 of the 14th Article of Amendment to the Constitution of the United States.

Second. The said Supreme Court of Oregon erred in holding that the act of the Legislature of Oregon, taking effect May 26, 1907, being Chapter 135 of the Laws of 1907, page 248, as construed by it, did not constitute an ex post facto law and as such was not repugnant to Section 10 of Article 1 of the Constitution of the United States.

Third. The said Supreme Court of Oregon erred in holding that the act of the Legislature of Oregon taking effect May 26, 1907, being Chapter 135 of the Laws of 1907, page 248, as construed by it, did not impair the obligation of the contract of de-

[illegible] thereinbefore referred into between the State of Oregon or its treasurer and the Title Guarantee and Trust Company, of Portland, Oregon.

Fourth. The said Supreme Court of Oregon erred in holding that the court below did not commit reversible error in excluding the sworn testimony of Edward Hirsh, A. H. Bush, W. H. Odell, John Sutherland, and William T. Phillips, to the effect that it had been the custom for 20 years prior to the 1st of June, 1907, for the state treasurer of Oregon to deposit all public funds, including the three educational funds involved in the proceedings, in banks in the form of general deposits subject to check, that the custom had been to segregate the funds in the custody of the treasurer only on the books of the depositaries, the banks in no case being advised of the nature of the funds deposited with them, and that this custom had been observed by the clerk of the state land board as well as by the state treasurer.

Fifth. The said Supreme Court of Oregon erred in ordering judgment to be entered and in entering judgment affirming the judgment of conviction of the plaintiff in error and the sentence of the trial court in so far as the same imposed imprisonment for five years in the Oregon state penitentiary.

V.

The information mentioned in paragraph I was filed against the defendant by the district attorney

of the State of Oregon for Multnomah County, pursuant to the authority conferred on him by Sections 1258, 1259 and 1260 of Bellinger & Cotton's Annotated Codes and Statutes of Oregon, which sections were passed by the Legislature of the State of Oregon and approved February 17, 1899, and are as follows:

Sec. 1258. District attorneys required to prosecute all crimes by information.

Hereafter it shall be lawful for the district attorney of any judicial district of this state, and it is hereby made his duty, to file, in the proper Circuit Court, an information charging any person or persons with the commission of any crime defined and made punishable by any of the laws of the state, and which shall have been committed in the county where the information is filed. (L. 1899, p. 99, Sec. 1.)

Sec. 1259. Form of information; manner of stating criminal act.

Information shall be substantially in the form prescribed in Section 1304 of the criminal code of the State of Oregon, except that the words "district attorney" shall be used instead of the words "grand jury" wherever the same occur; and the manner of stating the act constituting the crime, as set forth in the appendix to said criminal code, shall be sufficient in any such information in all cases where the forms there given are applicable;

and in other cases, forms may be used as nearly similar as the nature of the case shall permit. (L. 1899, p. 99, Sec. 2.)

Sec. 1260. Information how construed; when filed; proceedings under.

From the time any information is filed as provided in this act, the same shall be construed like an indictment, and shall be deemed to be in all respects the same as an indictment within the meaning of the present statutes of this state, and thereafter until and including final judgment and execution. The same proceedings shall be had, and with like effect, as in cases where indictments are returned by a grand jury: Provided, that when a defendant has been held to answer, as provided in Chapter XXII of Title XVIII of said criminal code, the information against him shall be filed on or before the first day of the next regular term of the Circuit Court, before which he is required to appear, unless such Circuit Court, upon good cause stated by the district attorney, shall extend the time; otherwise, on the second day of such term, or at the expiration of the time so extended, the court must order that the defendant if in custody be discharged, or if he has given bail that his sureties be exonerated, or money deposited in lieu of bail be refunded; but such order shall not be a bar to another prosecution for the same crime, unless it shall be a misdemeanor. (L. 1899, p. 99, Sec. 3.)

VI.

Section 1807 of Bellinger & Cotton' Codes referred to under which the information was brought, is as follows:

Sec. 1807. Larceny of public money.

If any person shall receive any money whatever for this state, or for any county, town, or other municipal or public corporation therein, or shall have in his possession any money whatever belonging to such state, county, town, or corporation, or in which such state, county, town, or corporation has an interest, and shall in any way convert to his own use any portion thereof, or shall loan, with or without interest, any portion thereof, or shall neglect or refuse to pay over any portion thereof, as by law directed and required, or when lawfully demanded to do so, such person shall be deemed guilty of larceny; and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than one nor more than 15 years, and by fine equal to twice the amount so converted, loaned, or neglected, or refused to be paid, as the case may be. (L. 1864; D. Cd., Sec. 554; D. & L., Sec. 559; H. C., Sec. 1772.)

VII.

In June, 1908, and pending the appeal of plaintiff in error from the judgment of the Circuit Court of the State of Oregon for Multnomah County to

the Supreme Court of the State of Oregon, Section 18, Article VII of the Constitution of Oregon was amended as follows:

Section 18 of Article VII of the Constitution of the State of Oregon shall be, and hereby is, amended to read as follows:

"Section 18. The legislative assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors; and out of the whole number in attendance at the court, seven shall be chosen by lot as grand jurors, five of whom must concur to find an indictment. No person shall be charged in any Circuit Court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this state, except upon indictment found by a grand jury. Provided, however, that any district attorney may file an amended indictment whenever an indictment has, by a ruling of the court, been held to be defective in form."

VIII.

Chapter 135 of Oregon Laws, 1907, page 248, is as follows:

AN ACT

To secure to the state interest on state moneys, to provide depositories for state funds; defining the duties of the state treasurer in relation

thereto; prescribing the security to be given and providing for the approval thereof.

Be it enacted by the people of the State of Oregon:

Section 1. It shall be the duty of the state treasurer, on the first Monday in June of each year, to designate such banks and trust companies within this state, as he may, under the provisions of this act, deem eligible to be made state depositories for the purpose of receiving on deposit funds of this state, and paying out the same on order or checks of the state treasurer.

Section 2. All banks and trust companies applying to be made state depositories under the provisions of this act, shall, on or before the first Monday in June of each year, file their application in writing with the state treasurer, said application to be accompanied with a sworn statement of the financial condition of said bank or trust company, at time application is made. The state treasurer shall pass upon all applications made in compliance with this act, and shall stamp upon the application "Approved" or "Rejected," and the same shall be duly signed by him. Any and all applications stamped "Approved" and signed by the state treasurer as herein provided, shall be deemed eligible to be made state depositories under the provisions of this act.

Section 3. The state treasurer shall deposit, and at all times keep on deposit in national banks doing

business in the State of Oregon, or other banks and trust companies doing business within this state, as shall have been approved under the provisions of this act as herein provided, the amount of money in his hands belonging to the several funds in the state treasury, and any such bank or trust company may file with the state treasurer its application for the privilege of keeping on deposit such funds or some part thereof. All such deposits shall be subject to payment when demanded by the state treasurer on his check, and any bank receiving and holding any such deposit as aforesaid, shall be required to pay and shall pay to the state for the privilege of holding the same, interest at the rate prescribed by the state treasurer as hereinafter provided, which rate of interest shall not be less than two per cent per annum, and subject also to such regulations as are imposed by law and the rules adopted by the state treasurer for receiving and holding such deposits; provided that the state treasurer may retain on hand in the state vault or in his control as such treasurer a sum not to exceed $100,000 as a reserve for the purpose of paying therefrom the current obligations of the state. The state treasurer shall annually on the last day of June, or when said day shall fall on Sunday, then on the next day preceding, fix the rate of interest to be paid on such deposits, which shall be not less than the rate hereinbefore in this act established, and

which rate when so established shall not be changed for such period of one year.

Section 4. The amount to be paid by any and all depositories under the provisions of this act, for the privilege of keeping such public funds on deposit, shall be computed on the average daily balance of the public moneys kept on deposit therewith, and shall be credited and paid to the state quarterly on the 1st day of January, April, July and October of each year, and such depository shall, quarterly, on the days aforesaid, render a statement in duplicate to the treasurer and secretary of state showing the amounts credited.

The treasurer shall require, and it is hereby made the duty of every such depository to keep accurate account of all such moneys deposited with it showing the amount deposited, and when deposited, and to render at the beginning of each and every month, to the treasurer and secretary of state, a statement, in duplicate, showing the daily balance of the state moneys held by it during the month next preceding, and the interest thereon, and all sums paid to the state for the privilege of keeping said moneys on deposit as aforesaid shall be credited by the treasurer to the general fund.

Section 5. For the security of funds so deposited under the provisions of this act, the state treasurer shall require all such depositories to deposit securities of the kind and character hereinafter described, or to give bonds for the payment

of such deposits and the interest thereon. Said bonds, when given, shall run to the State of Oregon, and, together with the securities offered, are to be approved as to the legal form by the attorney-general. Said bonds shall be conditioned that the depository shall at the beginning of each and every month render to the treasurer and secretary of state a statement in duplicate, showing the daily balance and the amount of money of the state held by it during the month preceding, and the amount of the interest thereon, and for the payment of said deposit and the interest thereon as hereinbefore provided, when demanded by the state treasurer, on his check at any time, and generally to do and perform whatever may be required by the provisions of the act and a faithful discharge of the trust reposed in such depository; provided, that no personal bonds shall be accepted. The bond provided for under this act shall be a surety company bond and shall be in substance as follows:

(Here follows form of the bond.)

All bonds and securities, after approval, shall be deposited with and held by the treasurer. It shall be the duty of the attorney-general to enter and prosecute to final determination all suits for the recovery of any penalty arising under the conditions of any bond required to be given by the provisions of this act.

Section 6. The state treasurer may designate a bank or trust company in the City of Salem or a

bank or trust company in the City of Portland as an active depository for the collection of any drafts, checks, certificates of deposit and coupons that may be received by him on account of any claim due the state.

Section 7. The bank or trust company designated as such active depository shall be required to give security to the state to be approved by the state treasurer, for the prompt collection of all drafts, checks, certificates of deposit or coupons that may be delivered to such active depository by the state treasurer for collection; also for the safe keeping and prompt payment on the state treasurer's order of the proceeds of all such collections; also for the payment of all drafts that may be issued to said state treasurer by such active depository.

Section 8. The state treasurer, on receipt of any draft, check or certificate of deposit on account of state dues, may place the same in such active depository for collection, and it shall be the duty of such active depository to collect the same without delay, without charge for its services for such collection or for exchange, and to notify the state treasurer when collected. The compensation to be paid by such active depository shall be fixed by the state treasurer upon the best terms obtainable for the state.

Section 9. The word "bonds" wherever used in this act shall be held to include bonds furnished by

surety companies authorized and qualified to do business in this state. The word "security" or "securities" shall be construed to include United States bonds, bonds of the State of Oregon and those for which it is ultimately liable, bonds of the several counties, cities, villages, towns and school districts of this state, warrants of the State of Oregon and of the several counties thereof on the current expense fund. No securities shall be approved unless their market value shall equal their par or face value. Upon payment to the state of the deposits and accrued interest for which security was given it shall be returned to the bank furnishing the same, and when such securities can be conveniently segregated, the amount thereof may be, in the discretion of the state treasurer, reduced in proportion as such deposits shall be reduced or repaid to the state.

Section 10. The state treasurer may cause an investigation to be made at any time to ascertain the sufficiency of any bank or security offered or given under this act, and to require new or additional security whenever in his judgment the safety of any deposit of state moneys under this act requires it; and such deposit shall be withdrawn unless such new or additional security be given. Any expense incurred in carrying out the provisions of this act shall be audited by the secretary of state and paid out of the general fund of the state. The state treasurer shall not be liable personally or

upon his official bond for any moneys that may be lost by reason of the failure or insolvency of any bank which becomes a depository under this act.

Section 11. The making of profit, directly or indirectly, by the state treasurer out of any money in the state treasury belonging to the state, the custody of which the state treasurer is charged with, by loaning or otherwise using it, or the removal by the state treasurer or by his consent of such moneys, or a part thereof, out of the vault or safe of the treasurer's department or out of any legal depository of such moneys, except for the payment of sums authorized by law to be paid, or for the purpose of depositing the same, under the provisions of this act, in banks which shall have qualified as depositories, shall constitute a felony, and on conviction thereof shall subject the treasurer to imprisonment in the state penitentiary for a term not exceeding two years or a fine not exceeding five thousand dollars ($5000), or by both such fine and imprisonment, and the treasurer shall be liable upon his official bond for all profits realized from such unlawful use of such funds.

Section 12. If the treasurer willfully fail or refuse at any time to do or perform any act required of him by this act he shall be guilty of a misdemeanor, and upon conviction thereof he shall be sentenced to pay a fine of not exceeding five thousand dollars ($5000).

Section 13. The offering or giving, directly or

indirectly, by any bank or depository, or by any officer or stockholder thereof, or by any other person or persons in its or their behalf, or by its or their knowledge, acquiescence or authority, or in its or their interest to the state treasurer of any gift, compensation, reward or inducement with the intent or for the purpose of inducing said treasurer to deposit funds of the state in any bank, contrary to any law of this state, shall constitute a felony, and shall, upon conviction thereof, subject the party or parties offending to imprisonment in the state penitentiary for a period not exceeding two years or by a fine not exceeding five thousand dollars ($5000), or by both such fine and imprisonment.

Section 14. The state treasurer is hereby authorized and empowered to sell any and all of the bonds, warrants and other securities that may be deposited as security for the deposit of any state funds in any depository under this act, at public or private sale, whenever there shall be a failure or refusal upon the part of any such bank, as a depository, to pay over the said funds or any part thereof upon the check or demand of the treasurer made upon such bank. Notice of the sale of such bonds, warrants or other securities under this act shall be given for a period of thirty days in a newspaper published in the City of Salem, Oregon, and when the sale thereof is made by the state treasurer, either at public or private sale, under this act, and such bonds, warrants or other securities have

been transferred by the state treasurer, the absolute ownership of such bonds, warrants and other securities rests in the purchaser or purchasers upon the payment of the purchase money to the state treasurer and upon filing a duplicate receipt therefor with the secretary of state. Should there be any surplus after paying the amount due to the state and expenses of sale it shall be paid over to the bank making the deposit.

Section 15. In the event all the funds of the state are not applied for by approved depositories under the provisions of this act, the state treasurer is authoried in his discretion to deposit the funds not so applied for and remaining in his hands, in some solvent bank or banks, trust company or trust companies upon the best terms obtainable.

Section 16. The word "funds" used in this act shall apply to all funds in the state treasury except the common school, agricultural college and university funds. Nothing in this act shall be construed to deprive the State Land Board of the power to invest or dispose of the funds derived from the sale of public lands as is now or may be provided by law.

Section 17. Whenever the state treasurer, in furnishing the bond required from him by law, shall furnish a bond executed by a surety company legally authorized to transact business in this state, and such bond shall be approved by the governor, the state shall pay the premium for such bond,

not to exceed one-third of one per cent per annum of the penalty named in the bond as executed and approved.

Whenever a person employed in the office of the state treasurer, required by law to furnish a bond, shall furnish a bond executed by a surety company legally authorized to transact business in this state, and such bond shall be approved by the state treasurer, the state shall pay the premium for such bond, not to exceed one-third of one per cent per annum of the penalty named in the bond so executed and approved.

Section 18. For the purpose of carrying out the provisions of this act there is hereby appropriated annually from any moneys in the state treasury, not otherwise appropriated, the sum of $1200.

Section 19. All acts and parts of acts in conflict herewith are hereby repealed.

Filed in the office of the secretary of state February 25, 1907.

IX.

Section 5 of Article VIII of the Constitution of the State of Oregon provides as follows:

The governor, secretary of state and state treasurer shall constitute a board of commissioners for the sale of school and university lands and for the investment of the funds arising therefrom, and

their powers and duties shall be such as may be prescribed by law.

X.

The Supreme Court of Oregon in the case of State v. Ju Nun, reported in 53 Oregon, page 1, construed the constitutional amendment referred to in paragraph VII, the opinion of the court being delivered in writing as required by law, and being as follows:

Statement by Mr. Chief Justice Bean.

Pursuant to the provisions of the act of February 17, 1899 (Laws 1899, p. 99), the district attorney of the fourth judicial district filed an information in the Circuit Court of Multnomah County charging the defendant with the crime of murder, without a preliminary examination and without any complaint having been filed against him. Upon the filing of the information a bench warrant was issued by order of the court and the defendant restrained of his liberty. He moved to set aside the warrant of arrest and information on the ground that the procedure adopted was violative of Section 18, Article VII, Constitution of Oregon, and Section 1 of the fourteenth amendment of the Constitution of the United States. This motion was overruled, and defendant entered a plea of not guilty. In due time the cause came on for trial before a jury, whereupon he objected to each juror as his name was drawn from the box, on the ground

that the law under which the jury was drawn was unconstitutional. These objections were overruled, and during the trial the state offered, and there was admitted over defendant's objection, an alleged dying statement of the deceased. The trial resulted in a verdict of manslaughter, and the defendant was sentenced to the penitentiary, from which judgment he appeals. Affirmed.

Opinion by Mr. Chief Justice Bean.

1. The questions raised by the motion to set aside the warrant of arrest and to quash the information were all discussed and decided adversely to defendant's position in State v. Guglielmo, 46 Ore. 250 (79 Pac. 577; 80 Pac. 103; 69 L. R. A. 466); State v. Tucker, 36 Ore. 291 (61 Pac. 894; 51 L. R. A. 246). The county court of each county is required to make up annually a jury list (Section 970 et seq. B. & C. Comp.), from which the jurors for the Circuit Court shall be drawn by the county clerk with the assistance of the sheriff or justice of the peace. Except in districts composed of no more than one county and having more than one judge of the Circuit Court the assistance of the sheriff or justice of the peace shall be dispensed with, and the drawing shall take place in open court in the presence of one or more of the judges and under his or their directions (Section 978, B. & C. Comp.). Multnomah County is the only county in the state constituting a judicial district and having more than one judge, and the contention for

the defendant is that the law providing for the drawing of jurors in open court applies to that county alone, and is therefore a special or local law "regulating the practice in courts of justice" and for "summoning and impaneling jurors," and void under Section 23, Article IV, Constitution of Oregon, which inhibits the legislature from passing special or local laws in certain enumerated cases, including those above stated.

2. The constitutionality of the act is sought to be raised by an objection made on the trial to the individual jurors as their names were drawn from the jury box; and we do not think it can be so raised. The objection is in effect a challenge to the panel and not to the poll, and such challenge has been abolished by statute. Section 117, B. & C. Comp.; State v. Fitzhugh, 2 Ore. 227; State v. Dale, 8 Ore. 229; State v. Savage, 36 Ore. 191 (60 Pac. 610; 61 Pac. 1128). At common law challenges to jurors were of two kinds—to the array or panel and to the poll. A challenge to the array was grounded upon objections which, if well taken, vitiated the whole panel or venire and required its discharge. A challenge to the poll was an objection to a particular juror. As the entire office of summoning the panel of jurors was at common law committed to the sheriff or other summoning officer, a right of challenge to the array on the ground of partiality or other disqualification of the officer was of the greatest importance to litigants; but in this

country the statutes generally provide that the selection shall be made by some designated officer or officers from a previously prepared list. A right to challenge the array is, therefore, of less importance than at common law, and consequently it has been absolutely abolished in some states (Baker v. State, 23 Miss. 243), and in others the statutes have prescribed the grounds upon which it can be made, and in such cases the challenge can be made only upon the grounds enumerated. State v. Bates, 25 Utah 1 (69 Pac. 70); People v. Schmidt, 168 N. Y. 568 (61 N. E. 907); People v. Jackson, 111 N. Y. 362 (19 N. E. 54); People v. Welch, 49 Cal. 174; People v. Wallace, 101 Cal. 281 (35 Pac. 862).

3. Our statute not only abolishes the right to challenge the array or panel, but defines a challenge as "an objection to an individual juror," and prescribes the grounds upon which it may be made. It is either peremptory or for cause. Section 119, B & C. Comp. A peremptory challenge is an objection for which no reason need be given. Id., Sec. 118. A challenge for cause is either that the juror is disqualified from serving in any action—that is, has been convicted of a felony, does not possess the qualifications prescribed by law for a juror or is of unsound mind, etc.—or that he is disqualified from serving in that particular action on trial on account of implied or actual bias. Id., Secs. 119-123 inclusive. These are the only challenges to a juror allowed under our procedure. It may be that,

if persons were called or summoned as jurors wholly without color of law, an objection on that ground would be available to a litigant, for in such a case the persons so called or summoned would not be a jury either de facto or de jure; and this is probably what Mr. Justice Boise had reference to in State v. Dale, 8 Or. 229, when he said that the challenge in that case should have been made to the individual juror that he was improperly or illegally drawn or summoned. Where, however, the drawing and summoning is under color of law and semblance of legal authority, and the jurors are accepted and treated by the court as legal jurors, they are at least such de facto; and it is not open to a litigant to object to their serving in a particular case on the ground that the law under which they were drawn is unconstitutional. The Constitution of New York prohibited the enacting of local laws for the selection and drawing of grand jurors. In 1881 the legislature passed an act regulating the drawing of such a jury in the County of Albany. The court declared the act unconstitutional but that no substantial right of the defendant was invaded by holding him to answer to an indictment returned by the grand jury drawn in pursuance thereof. The court said that the unconstitutionality of the law did not deprive the jury of the character of a grand jury in a constitutional sense; and, although selected in pursuance of a void law, it was selected under color of law and was a de

facto jury. People v. Petrea, 92 N. Y. 128. And so in this case no constitutional or substantial right of the defendant was affected by the manner in which the jurors were drawn. The particular jurors were competent and qualified. This was sufficient.

4. It is next claimed that the court erred in the admission in evidence of the dying declaration of the deceased. He was shot through the lungs about 11 o'clock at night and died the next afternoon. In the morning after his removal to the hospital he made a statement as to the cause and manner of his death; and it is the admission of this statement of which the defendant complains, on the ground that it did not appear that the deceased was under a sense of impending death at the time it was made. Before making the statement the attending physician had pronounced his case hopeless, and he was informed of that fact by an interpreter, and that in the opinion of the physician he could live but a few hours. The interpreter says:

"The doctor told me to tell him about his going to die soon. I told him. The first time he didn't seem so full to realize it until the second time, and then the doctor said his case is very serious and there is no chance for him whatever. And I told him that again, and he became realized full about the fact. As far as I can remember about what he said—after I told him what the doctor said about his condition—then he said, I think it might be

something like that, in those words, then he bowed his head that way (indicating), kind of shut his eyes and bowed his head to make peace, I think. That is as far as I can remember. He had such a sad feeling over him when I told him what the doctor said. I saw his countenance much in such a deep sad feeling; and he shut his eyes and bowed his head. 'Maybe, maybe,' he repeated twice, I think. I suppose he intended to say something, but was too sad and could not say it. The Chinese when they are sick and believe they are going to die, they will not say for the bad luck of it. They won't say that for anything. They are so superstitious about it."

This was, we think, a sufficient prima facie showing to entitle the statement to be admitted in evidence. State v. Fuller, 52 Ore. 42 (96 Pac. 456); State v. Doris, 51 Ore. 136 (94 Pac. 44).

5. The deceased was at the time dying from a gunshot wound and knew that fact. He had been informed through the interpreter that in the opinion of the attending physician he could survive but a few hours; and from the testimony of the interpreter it appears that he realized and apprehended his condition and the imminence of death. It is true that he did not himself express a belief in the near approach of death, but to render his statements competent as dying declarations it is not necessary that he should have done so. His condition of mind was quite apparent from his con-

duct and the surrounding circumstances. State v. Fletcher, 24 Or. 295 (33 Pac. 575).

Judgment affirmed.

ON PETITION FOR REHEARING.

Opinion by Mr. Chief Justice Bean.

6. After the defendant had appealed, but before the disposition of the appeal, an amendment to the constitution was adopted (June, 1908), which provides, among other things, that "no person shall be charged in any Circuit Court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this state except upon indictment found by the grand jury." It is now contended that by reason of this amendment the court is without jurisdiction and must order a discharge of the defendant. It is settled that the repeal of a law conferring jurisdiction takes away all right to proceed, under the repealing statute, as to all actions, suits or proceedings pending at the time of the repeal unless there is a saving clause in the repealing statute, and this is so in an appellate as well as the court of original jurisdiction. 1 Lewis, Sutherland's Statutory Construction 553, 554; Ex parte McCardle, 7 Wall. 506 (19 L. Ed. 264); Insurance Co. v. Ritchie, 5 Wall. 541 (18 L. Ed. 540); Sherman v. Grinnell, 123 U. S. 679 (8 Sup. Ct. 260; 31 L. Ed. 278); Keller v. State, 12 Md. 322 (71 Am. Dec. 596); State v. Allen, 14 Wash. 103 (44 Pac. 121); Mahoney v. State, 5 Wyo.

520 (42 Pac. 13; 63 Am. St. Rep. 64); Aaron v. State, 40 Ala. 307; Higginbotham v. State, 19 Fla. 557.

7. The constitutional amendment in question did not in terms repeal the law conferring jurisdiction upon the courts to hear and determine causes in which a defendant had been accused of a crime by information filed by a district attorney prior to the adoption, and we do not think it does by implication. The criminal code of 1864 declares that no person can be prosecuted for the commission of a crime but upon the indictment of a grand jury, unless otherwise provided by law. Hill's Ann. Laws 1892, Sec. 1204. It also provides in detail for the drawing and forming of a grand jury, defines its powers and duties, provides the form of indictments and the manner of finding and returning the same, and for all subsequent proceedings thereon. In 1899 the legislature adopted, as it had power to do, an act making it lawful for a district attorney to proceed by information against any person accused of the commission of a crime, without the intervention of a grand jury, and providing that the form of the information and the manner of setting out the acts constituting the crime should be substantially the same as provided in case of an indictment, and that from the time the information is filed it shall be construed like an indictment and shall be deemed to be in all respects the same, and thereafter until and including final

judgment and execution. Laws 1899, p. 99. This statute has not been repealed, and we think the recent constitutional amendment had no effect thereon, except to deprive a district attorney of the right to file an information in the Circuit Court by requiring that all prosecutions in that court thereafter instituted shall be by indictment. In all other respects the statute is in full force and effect, and the jurisdiction of the court to proceed with pending cases remains unimpaired. The language of the amendment is in the future tense, and is susceptible of a construction making it applicable to future and not pending cases, and it should be so construed (26 Am. & Eng. Enc. Law (2d ed.) 693; Trist v. Cabenas, 18 Abb. Prac. (N. Y.) 143; Seattle v. O'Connell 16 Wash. 625; 48 Pac. 412), especially in view of the consequences which would result from the contrary view (People ex rel. v. Potter, 47 N. Y. 375).

8. It will be observed that the amendment does not provide that a person shall not be "tried" or "prosecuted" for a criminal offense except upon indictment, but simply that he shall not be charged therewith. The word "charged" as applied to criminal proceedings may have different meanings, according to the subject-matter and the context. It may mean the accusation which precedes the formal trial, or it may mean the responsibility for the crime itself, and may be applicable to one who has been convicted and is serving a sentence. 2 Adj.

Words & Phrases 1069; Drinkall v. Spiegel, 68 Conn. 441 (36 Atl. 830; 36 L. R. A. 486). In common parlance it signifies the formal commencement of a criminal proceeding by the filing or returning of the accusatory paper. People v. Garnett, 129 Cal. 364 (61 Pac. 1114). When we speak of charging a person with the commission of a crime we ordinarily mean the commencement of the proceeding by the filing of a written complaint or accusation, and in our opinion it was in this sense that the words were used in the constitutional amendment in question. Hence, when it provides that no person shall be charged with a crime except upon indictment, it means that no prosecution shall hereafter be commenced except in the manner stated, and does not refer to pending cases. The amendment does not repeal or change the law under which defendant was tried and convicted, nor makes that a criminal act which was innocent when committed, or change the punishment, or alter the rules of evidence, or in any other manner affect any substantial right of the defendant. It was a mere change in the procedure, and is prospective, not retrospective. Smith v. Smith, 38 Conn. 397.

Judgment affirmed.

Former opinion adhered to. Affirmed.

XI.

Section 1807 of Bellinger & Cotton's Codes, referred to, was construed by the Supreme Court of

Oregon in the case of Baker v. Williams, reported in 42 Oregon, page 213, said opinion being as follows:

Baker v. Williams Banking Company.

On November 14, 1895, the Williams & England Banking Company, a corporation engaged in a general banking business at Salem, in this state, suspended payment, and in a suit brought for that purpose a receiver was appointed with power to convert its assets into cash for the payment of its obligations and to wind up its affairs. On January 3, 1896, by order of the court, the receiver published a notice to creditors requiring all persons having claims against the bank to present the same to him, with proper vouchers, within ninety days from the date of such notice, and also notifying the creditors, stockholders and all other persons interested to appear within a specified time and file objections, if any, to the allowance of claims so presented. In pursuance of this order claims were presented by Ladd & Bush for $10,000 and interest thereon at 10 per cent per annum, evidenced by two promissory notes; E. C. Giltner, agent, for $25,000 on five non-interest bearing certificates of deposit, issued by the bank to sundry persons, and by them assigned to Giltner; Phil Metschan, as state treasurer, for $8013.60, due on open account; E. J. Swafford, city treasurer of Salem, $7349.33, on open account, and W. H. Odell, clerk of the State Land Board, for $5047.27, on open account.

On July 3, 1896, the receiver reported to the court a list of all claims filed with him, including those above mentioned, stating, however, that none of the latter bore interest except the claim of Ladd & Bush, and asking for an order of distribution of the funds then in his hands. On the hearing of such report the receiver and Ladd & Bush appeared by their respective attorneys, and no objection having been filed to the claims so presented, it was "ordered, adjudged and decreed that said claims be allowed as presented and reported to this court by said receiver," describing them particularly as in the receiver's report. It was also ordered that "claims in which interest has been provided for by the terms of the obligation shall bear interest at the rate of interest stated herein from the date of each claim as stated herein," and that the receiver pay out of the funds then in his hands, on each of the claims so allowed, a dividend of 38 per cent, including interest on the interest bearing claims to the date of the failure of the bank. The order is silent, however, as to whether interest should be allowed on the non-interest bearing claims, except that it is specified therein that they bore no interest. Thereafter the receiver continued to pay dividends on the principal of the claims so allowed, and in December, 1901, having enough money on hand to pay the principal of such claims and leave a balance to be applied on interest, he petitioned the court for instructions as to the payment of interest

thereon. Ladd & Bush thereupon filed objections to any further payments of principal or interest on the claims of Giltner and Metschan, because such claims represent funds of the State of Oregon improperly loaned to and deposited with the insolvent bank by Metschan as state treasurer, for a consideration by way of interest to be paid to him, and such funds are the property of the state. They also object to the allowance of interest on the claim of Odell, for the reason that the amount thereof was deposited by him with the bank while acting as clerk of the State Land Board, or on that of Swafford, for the reason that it represents money belonging to the City of Salem which he wrongfully and unlawfully allowed to accumulate in his hands; and they object generally to the allowance of interest on any claim other than those bearing interest by contract. In support of their objections they aver that under their contract they are lawfully entitled to receive the full amount due them, principal and interest, and that there will not be sufficient funds to pay such amount and interest on non-interest bearing claims.

Metschan and Giltner demurred to the objections of Ladd & Bush, and their demurrer being overruled, they answered separately. Metschan by his answer denies that at the time the claim referred to in the petition was filed by him with the receiver the money represented thereby, or any part thereof, was state funds, and denies that the

money was ever loaned to the bank or improperly or unlawfully placed with it, and as a bar to this proceeding pleads the order and judgment of the court made in July, 1896, allowing his claim as presented. Giltner answered denying that the claim as presented by him was for money loaned to the defendant corporation by the treasurer of the State of Oregon and denying positively that any of the money represented thereby was state funds at the time the claim was presented by him to the receiver, and for a further defense pleading as a bar to this proceeding the judgment and order of the court made in July, 1896, allowing his claim. He then sets up affirmatively the issuance by the bank of the certificates of deposit to his several assignors, and the assignment thereof to him. Swafford and Baker, his assignee, filed an answer, in which they deny that the funds, or any part thereof, represented by the claim of Swafford was for money loaned to the bank, but aver that it was the property of the City of Salem deposited with the bank for safe keeping, and payable on demand; that Baker was one of the sureties upon the official undertaking of Swafford, and after the claim had been presented and allowed by the court he made a settlement with the city, and thereupon it and Swafford assigned to him the whole of the claim, and he is now the bona fide owner and holder thereof. Odell answered, denying some of the allegations of the petition and alleging in effect that

the claim, as presented by him to the receiver and allowed by the court, was for moneys tendered to him in the capacity of clerk of the State Land Board by various citizens of the state in the form of checks, drafts and postoffice orders, which he placed with the bank for collection, with intent, as was his usual custom, to withdraw from the bank at the end of the month and pay over to the state all of the money officially accepted and receipted for by it; that he had no personal interest in the fund and received no interest from the defendant on account of the deposits, and that on the failure of the bank he borrowed on his individual and personal credit and immediately paid to the state treasurer, for the use and benefit of the different funds to which it properly belonged, the whole of the amount due the state from him on account of said deposits. A reply was filed by Ladd & Bush to the answers of Giltner and Metschan, denying the force and effect of the order or judgment of July 3, 1896. Motions for judgment on pleadings were afterwards overruled, and evidence was taken and submitted to the court, which made its findings to the effect that the consideration and basis for the claims of Giltner and Metschan were funds of the State of Oregon improperly deposited with and loaned to the defendant corporation for interest, contrary to the laws of the state, and thereupon ordered and directed that no interest be paid upon either of said claims, but overruled the objection

as to other claimants. From this order Metschan and Giltner and Ladd & Bush appeal.

Affirmed.

Mr. Justice Bean, after stating the facts, delivered the opinion of the court.

1. It is contended by Metschan, Giltner, Odell and Baker that the order of July 3 1896, allowing their claims against the insolvent estate, and directing the payment of a dividend thereon is a conclusive adjudication of all questions sought to be litigated on this appeal. It is familiar law that an issue once adjudicated in a court of competent jurisdiction cannot be again litigated between the same parties or privies, and the judgment thereon is conclusive in another action on the same demand, not only as to every matter that was actually litigated, but as to every other question that might have been litigated. Neil v. Tolman, 12 Ore. 289 (7 Pac. 103); Morrill v. Morrill, 20 Ore. 96 (25 Pac. 362; 11 L. R. A. 155; 23 Am. St. Rep. 95). An order or decree of a court of equity regularly made in the matter of the receivership of an insolvent estate upon the petition of a creditor, allowing or disallowing a claim payable out of the fund in the hands of the receiver, is within this principle. It has twice been practically so held by this court. The question first arose in Rockwell v. Portland Sav. Bank, 35 Ore. 303 (57 Pac. 903), in which a creditor of the bank petitioned the court for an order requiring the receiver to list its claims and

directing that it be permitted to participate in the dividends theretofore declared and thereafter to be declared. The petition was denied, and on a motion to dismiss an appeal from the order it was held that it was final on the rights of the petitioner, because "it effectually and finally determines its right to participate in any dividends of the insolvent bank, whether declared before or after the entry of the order, and precludes the possibility of proceeding further in the premises." In another instance the receiver in the same case refused to pay a dividend on a claim of one of the creditors which on its petition had been allowed by the court, and on an appeal from the order requiring him to do so it was held that "the order of the court allowing the claim of the petitioner, made after the execution of the mortgage, was a final order, * * * and in our opinion is conclusive as to its right to participate in the dividends." Rockwell v. Port. Sav. Bank, 39 Ore. 241 (64 Pac. 338). And such seem to be the decisions of other courts. Trustees v. Greenough, 105 U. S. 527; Williams v. Morgan, 111 U. S. 684 (4 Sup. Ct. 638); Gumbel v. Pitkin, 113 U. S. 545 (5 Sup. Ct. 616); Standley v. Hendrie & B. Mfg. Co., 25 Colo. 376 (55 Pac. 723); Grant v. Superior Court, 106 Cal. 324 (39 Pac. 604).

It will be observed that in all the cases referred to the order or decree under consideration was based upon a petition, regularly filed, setting

out the facts constituting the claims. The petitioner thereby made himself a party to the suit, and the proceedings thereafter became in effect an independent suit or action brought by him to establish his claim; and the judgment or order rendered therein would naturally partake of the nature or characteristics of any other judgment or order and be entitled to the same effect. In the case at bar, however, the order allowing the claims now in controversy was not based upon the petition of the claimants, but upon a report of the receiver, containing a mere list of the persons filing claims with him, together with the nature and date of the claim, a statement as to whether it bore interest, and if so, the rate, date when filed and amount; and the order allowing the claims as presented was apparently ex parte and without notice to interested persons. It does not state that it was made after notice, and so far as the record shows no notice whatever was given of the filing of the receiver's report, and no opportunity given to file objections thereto. It is true the order recites that in the January prior thereto the receiver, by direction of the court, published a notice requiring all claims to be presented to him within ninety days from the date of the first publication thereof, and also requiring all objections to the allowance of claims to be filed within thirty days from the same date. It would scarcely be contended, however, that the court could thus cut off the right of cred-

itors, stockholders or others interested in the insolvent bank to object to the allowance of claims prior to the time such claims were required to be filed. It is therefore doubtful whether the doctrine as to the conclusiveness of an order or judgment allowing claims against an insolvent estate in the hands of a receiver, made after notice to interested parties, could apply in this case. But it is not necessary to decide that question. Ladd & Bush, the objectors here, voluntarily made themselves parties to the proceeding, appeared by counsel at the time the order was made approving the receiver's report and allowing the claims, and they are concluded by whatever the court decided at that time. The objection that the basis of the several disputed claims was public funds, wrongfully and unlawfully deposited in the insolvent bank by the custodians thereof under such circumstances and agreements that a court of equity would not entertain a proceeding for the recovery thereof, might have been insisted upon by them at the time the matter was pending, but not having been urged at that time, cannot be inquired into now at their instance. So far, therefore, as the legality and validity of the contested claims are concerned and the right of the claimants to participate in the distribution of the funds in the hands of the receiver, the order of July 3, 1896, is conclusive in this proceeding.

2. It is further urged, however, that the orde-

is not only conclusive as to the principal of the respective claims, but was a final determination of the right to interest thereon, and effectually barred the court from afterward considering that question. This contention is based on the theory that the order is a judgment or decree, within the meaning of the statute in force at the time it was made (Hill's Ann. Laws, Sec. 3587), providing that the rate of interest shall be eight per cent on judgments and decrees for the payment of money. In our opinion, however, it cannot be so considered, but is nothing more than an order passing the report of the receiver and allowing the claims presented to and listed by him as a basis for the distribution of the funds then in his hands and for subsequent distributions. It does not constitute a judgment or decree as ordinarily understood. It was made ex parte without adverse parties, without pleadings and without any issue of facts being tendered, and is therefore not entitled to be regarded in all respects as a judgment or decree. It was an order made by the court in the course of the distribution of the insolvent estate, approving and allowing certain claims against it, and to that extent is final and conclusive as to the validity of such claims on parties and privies; but it does not preclude inquiry into the question of interest on non-interest bearing claims.

3. The order itself indicates that the court did not intend to pass upon that question, but reserved

it for further consideration. The receiver in reporting a list of the claims filed with him stated specifically in each instance whether the claim bore interest or not; and the court allowed these claims "as presented and reported" by the receiver, incorporating in its order the statement that the particular claims in controversy bore no interest. In addition it provided that interest should be paid on interest bearing contracts at the rate therein specified, from the date of the obligation. The question of interest was therefore under consideration at the time, and the fact that the order contains no reference to the non-interest bearing claims leads naturally to the conclusion that the court did not intend such claims to bear interest unless in pursuance of a subsequent order. The question, therefore, whether the non-interest bearing claims are entitled to interest, and if so, from what date, is now to be determined without regard to the order of July 3, 1896, allowing such claims as the liability of the estate.

4. The statute provides that interest shall be due and payable on all moneys after the same become due, and on money received to the use of another and retained beyond a reasonable time without the owner's consent. Hill's Ann. Laws, Sec. 3587. Money deposited in a bank, in the absence of a special contract becomes due on demand, and if not paid will bear interest from that time. 16 Am. & Eng. Enc. Law (2d ed.) 1020, 1021. In case

of the insolvency of the bank, the presentation of a claim to the receiver for the money so deposited and its allowance by the court are equivalent to a demand within this rule, and thereafter the money is considered as withheld without the owner's consent. In Richmond v. Irons, 121 U. S. 27 (7 Sup. Ct. 788), the Supreme Court of the United States announces as the rule in reference to interest on claims against an insolvent bank that "in the case of book accounts in favor of depositors * * * interest would begin to accrue as against the bank from the date of its suspension." And in California, where they have a statute like ours, it is said in McGowan v. McDonald, 111 Cal. 57 (43 Pac. 418; 52 Am. St. Rep. 149), that "when a bank suspends business and refuses to pay its depositors, it thereafter clearly detains money which it received to their use, and under the provisions of the code must be held liable for interest thereon." See also Shepherd v. Shepherd's Estate, 108 Mich. 82 (65 N. W. 580); Harwood v. Larramore, 50 Mo. 414; In re Wainwright's Estate, 13 Phila. 336. The claims in controversy should therefore bear interest at the legal rate from the date of their allowance if they represent funds upon which the holders are entitled to receive interest.

5. It is contended by the objectors, however, that such claims represent public funds deposited with the insolvent bank by the custodians thereof and not the private funds of individual claimants,

and for this reason no interest should be paid them thereon. It is made a felony by statute for any person having in his possession any money belonging to the state, county, town or other municipality to convert to his own use or loan the same, with or without interest (Hill's Ann. Laws, Sec. 1772); and while a mere deposit in a bank for safe keeping is not inhibited by this provision, it is manifest that in case of the failure of the bank the officer is not entitled to interest in his own right on the fund so deposited, whatever the right of the state or municipality might be in the premises. If, therefore, the claims are in fact for public money, as the objectors allege, no interest should be allowed thereon. A public officer may not loan, with or without interest, any part of the public funds in his possession without being guilty of a felony; but he is required to keep such funds safely, and for that purpose may deposit them in a bank, provided they are at all times subject to his order, and there is no fixed period during which he has no right to demand their return. In re Law's Estate, 144 Pa. 499 (22 Atl. 831; 14 L. R. A. 103); Allibone v. Ames, 9 S. D. 74 (68 N. W. 165; 33 L. R. A. 785); State v. McFetridge, 84 Wis. 473 (54 N. W. 1096; 20 L. R. A. 223); State v. Hill, 47 Neb. 456 (66 N. W. 541); Thompson v. Territory, 10 Okla. 409 (62 Pac. 855). The deposit is made on his own personal responsibility, however; and if, in case of the failure of the bank, he makes the loss good, the

money deposited must necessarily become his property, and thereafter be considered and treated as such.

Now, the claim in favor of Odell was for money tendered to him in the capacity of clerk of the State Land Board by various citizens of the state in the form of checks, drafts and postoffice orders, which he placed with the bank for collection, intending, in accordance with his usual custom, to withdraw at the end of the month and pay over to the state all money that had been accepted and receipted for; and it is affirmatively alleged and conclusively proved that on the failure of the bank he borrowed on his own individual and personal credit and immediately paid to the state treasurer, for the use and benefit of the different funds to which it properly belonged, the whole of the amount due the state from him on account of such deposits. The claim in favor of Swafford was for money deposited by him as city treasurer with the bank for safe keeping, and it is stipulated that after the presentation and allowance of the claim his bondsmen settled with the city, whereupon he and the city assigned the claim to the defendant Baker, who is now the owner thereof. The loss to the state was therefore made good by Odell, and to the city by Swafford's bondsmen. There is no reason, therefore, either in law or equity, why they should not stand on exactly the same footing as other claim-

ants holding non-interest bearing contracts against the insolvent bank.

6. In the case of Giltner and Metschan, however, the evidence shows that the claims as presented were for money belonging to the state which had been deposited with the bank by Mr. Metschan as state treasurer; and there is neither allegation nor proof that the loss has been made up to the state or that such money at any time has ceased to be state funds. The amount represented by the claim presented by Metschan was on an open account to his credit as state treasurer. The claim is presented and verified by him in that capacity, and therefore on its face shows that it is state funds. The Giltner claim was originally evidenced by certificates of deposit issued in Metschan's name. A few days before the failure of the bank, however, the certificates were surrendered, the fund divided up and new certificates issued to several private individuals, who immediately assigned them to Giltner as agent for Metschan, so this claim is also, in fact, for state money deposited in the bank by Metschan. In view of the statutory provision making it a crime for an officer to convert public funds to his own use or to loan the same, with or without interest, it is clear that no interest should be allowed Metschan on either of these claims until it is affirmatively shown that the money has ceased to be public funds. If, after the failure of the bank or after the presentation and

allowance of the claim, he made the loss good to the state by paying the money into the state treasury, he became from that time the owner in his private capacity of the claims so presented and allowed, and would be entitled to interest thereon. But upon this question there is no allegation and no proof except the testimony of his successor in office that Metschan accounted to him for all the state funds by turning over some certificates of deposit and "a good many things that were representatives of money." This evidence is not only outside of the issues, but is insufficient to show that Metschan took over to himself the amount due from the insolvent bank by making the loss good from his private funds, and until such a showing the court cannot decree that interest be allowed thereon.

7. The objectors allege that at the time the claims were presented and allowed by the court the money belonged to the state. This allegation is denied by Metschan and Giltner. There was no evidence offered on the subject, however, except that the money was public funds at the time it was deposited in the bank, and it will be presumed that it continued to be such until the contrary is made to appear by the claimants.

8. The facts in relation to this matter are peculiarly within their knowledge, and hence the burden of proof is upon them to show that the money

has ceased to be public funds, and until they do so no interest can be allowed thereon.

It is insisted that none of the non-contract interest bearing claim holders are entitled to interest out of the funds in the hands of the receiver as against the claims of the objectors and all other parties holding interest bearing contracts, and Daniell, Chancery Pl. & Pr. (Vol. 2, 6 Am. Ed., p. 1253), is cited in support of this doctrine. An examination, however, of the test and the authorities referred to by the author shows that the principle there announced is based on a rule of the English chancery courts having the force and effect of a statute. See Garrard v. Lord Dinorben, 5 Hare 213.

Upon the record as presented the decree of the court below must be affirmed.

Affirmed.

XII.

The opinion of the Supreme Court of Oregon in the case sought to be reviewed herein is reported in 55 Oregon page 450, and is as follows:

[redacted] v. Ross.

From Multnomah. George H. Burnett, Judge.

Statement by Mr. Justice Eakin.

This defendant J. Thorburn Ross is charged by information, jointly with Geo. H. Hill, T. T. Burkhart and John E. Aitchison, with the crime of larceny, committed in Multnomah County, Oregon,

and upon change of venue the case was transferred to Marion County for trial. The substance of the charge is that on the 9th day of September, 1907, the Title Guarantee and Trust Company (hereafter referred to as the "Trust Company") was a corporation carrying on a banking business of which the defendants were directors and J. T. Ross president, Geo. H. Hill vice-president, T. T. Burkhart treasurer, and that the defendants on that date, pretending to act for said Trust Company, had in their possession and control for safe keeping, as officers and directors of the Trust Company, $288,426.87 belonging to the State of Oregon, and being a part of the irreducible school fund, agricultural college fund and the university fund (hereafter referred to as the "educational fund"); that defendants, well knowing that such money belonged to that fund, did then and there willfully, unlawfully and feloniously convert the same to their own use, which money, prior to that date, they, as officers and directors of the Trust Company, had received for the state for safe keeping from Geo. A. Steel as state treasurer.

The facts upon which the issues here arise are that the Trust Company, since the year 1904, has been engaged in banking, but not exclusively in such business; that it had also prepared abstracts of title, written title insurance, made mortgage loans, receiving compensation for such services as a broker; that it had sold real estate on commission

and performed other services for compensation; that on the 14th day of January, 1907, when Geo. A. Steel took the office of state treasurer he had $400,000 of the state's money on deposit, subject to his check, in various banks within the state. Of this sum $55,000 was deposited with the Trust Company. At that time there was no segregation of the funds of the treasurer as between the educational funds except on the books of the treasurer, and such banks had not been notified to which fund the deposits belonged. Thereafter Steel continued the account with the Trust Company in the name of "Geo. A. Steel, state treasurer," and deposits were made and checks drawn against the same from time to time until the 3d day of June, 1907, at which time the Trust Company had been designated by the treasurer as an active depository of the state under the provision of Section 6 of an act of the legislative assembly of the State of Oregon, adopted in the year 1907, providing for state depositories for state funds (Laws, 1907, p. 248), at which time, evidently for the purpose of complying with the terms of such statute, Steel segregated the funds, and accordingly wrote to the Trust Company as follows:

"State of Oregon, Treasury Department,
Salem, June 3, 1907.

The Title Guarantee and Trust Company, Portland, Oregon.

Gentlemen—I inclose herewith for credit of

Geo. A. Steel, state treasurer, educational, the following checks:

No. 319, Geo. A. Steel, state treasurer, on you $272,449.02

No. 24, Geo. A. Steel, state treasurer, on Ladd & Tilton 2,600.00

Total $275,049.02

Yours very truly,

GEO. A. STEEL,
State Treasurer."

Thereupon, on the 5th day of June, 1907, an account was opened on the books of the Trust Company entitled, "Geo. A. Steel, Treasurer, Educational," the first item of which was the credit of the above amount, and thereafter, prior to November 6, 1907, the time of the appointment of the receiver for the Trust Company, many other credits were made in that acount for checks sent by Steel for deposit therein, and on that day the balance to the credit of that account was $288,426.87. The remittances were all made in checks and drafts, except as above mentioned, and, except as stated, there was no evidence of possession of the money by defendants, or that the checks had been collected or converted into cash by the Trust Company, or any one. Until the 20th day of August, 1907, the Trust Company always had on hand cash exceeding the balance due from it on the educa-

tional account, but on the next day it was about $300 less than such balance. This deficiency increased thereafter until November 6, 1907, when the Trust Company's cash on hand lacked $274,882.73 of being equal to the balance due on such account, and on that date all its cash was turned over to the receiver.

Defendant Ross testified that he did not convert to his own use any money whatever belonging to the educational fund of the state. When asked, "How much money did you get from the State of Oregon as deposited by the state treasurer with the Trust Company?" his answer was, "I never received any money from the State of Oregon." A written demand was made by Steel, as treasurer, on the Trust Company, for the amount of such account on November 12, 1907, service of which was accepted for the Trust Company by defendant Ross, as president. Steel testified that he did the business with the bank, and had no business with defendants; that he might have corresponded with Ross, but thought not; may have talked with him about depositing these funds, after the law took effect, but does not recollect. But the account was segregated, and he says he did have an arrangement or agreement with Burkhart, Ross, Aitchison, or Hill, about the manner or arrangement by which these funds would be deposited in the bank, but did not think that Ross knew, at the time, any further than is disclosed

by Steel's instructions at the office. He says he probably spoke to him, but does not remember any conversation. The principal dealings were with Ross or Burkhart. He further testifies that pending the passage of the bill providing for depositories before the legislature of 1907, he probably consulted with Ross about it, and sent him copies of the bill.

The trial resulted in a verdict against the defendant of guilty, and a finding by the jury that the amount of money converted was $288,426.87. Thereafter defendant moved the court in arrest of judgment on the ground that the information does not state facts sufficient to constitute a crime, and also a motion for a new trial for insufficiency of the evidence to justify the verdict, and errors of law occruing at the trial, which motions were denied. Thereupon judgment was rendered against defendant that he be imprisoned in the penitentiary of the State of Oregon for the term of five years; that he be adjudged to pay a fine in the sum of $576,853.74; that he be imprisoned in the county jail of Multnomah County, Oregon, until such fine is paid, not exceeding 288,426 days; and that the state recover of and from the defendant its costs and disbursements. From this judgment defendant appeals.

Affirmed.

For appellant there was a brief with oral argu-

ments by Mr. Wallace McCamant, Mr. William P. Lord, and Mr. William Kaiser.

For the state there was a brief over the names of Mr. Andrew M. Crawford, attorney general; Mr. George J. Cameron, district attorney, and Mr. Martin L. Pipes, with oral arguments by Mr. Cameron and Mr. Pipes.

Mr. Justice Eakin delivered the opinion of the court.

1. The statute (B. & C. Comp.) upon which this prosecution is based provides:

"Sec. 1907. If any person shall receive any money whatever for this state * * * or shall have in his possession any money whatever belonging to such state * * * and shall in any way convert to his own use any portion thereof * * * such person shall be deemed guilty of larceny. * * *"

The first question for consideration relates to the character of the deposits made by the state treasurer with the Trust Company, whether they were general or special, and this depends on the terms of the statute of 1907, under which the deposits were made (Laws, 1907, p. 248), which took effect May 26, 1907. The portions of the act applicable here are as follows:

"Section 1. It shall be the duty of the state treasurer, on the first Monday of June of each year, to designate such banks and trust companies within this state, as he may, under the provisions of

this act, deem eligible to be made state depositories, for the purpose of receiving on deposit funds of this state, and paying out the same on order or checks of the state treasurer."

"Section 3. The state treasurer shall deposit, and at all times keep on deposit in national banks doing business in the State of Oregon, or other banks and trust companies doing business within this state, as shall have been approved under the provisions of this act as herein provided, the amount of money in his hands belonging to the several funds in the state treasury, and any such bank or trust company may file with the state treasurer its application for the privilege of keeping on deposit such funds or some part thereof. All such deposits shall be subject to payment when demanded by the state treasurer on his check, and any bank receiving and holding any such deposit as aforesaid shall be required to pay and shall pay to the state for the privilege of holding the same, interest at the rate prescribed by the state treasurer as hereinafter provided, which rate of interest shall not be less than two per cent per annum. * * *"

"Section 5. For the security of funds so deposited under the provisions of this act, the state treasurer shall require all such depositories to deposit securities of the kind and character hereinafter described, or to give bonds for the payment of such deposits and the interest thereon. Said

bonds, when given, shall run to the State of Oregon, and, together with the securities offered, are to be approved as to the legal form by the attorney general. * * * The bond provided for under this act shall be a surety company bond. * * * (Here follows the form of bond to be given by a surety company.)"

"Section 9. The word 'bonds' wherever used in this act shall be held to include bonds furnished by surety companies authorized and qualified to do business in this state. The word 'security' or 'securities' shall be construed to include United States bonds," etc.

"Section 16. The word 'funds' used in this act shall apply to all funds in the state treasury except the common schools, agricultural college, and university funds. Nothing in this act shall be construed to deprive the state land board of the power to invest or dispose of the funds derived from the sale of public lands as is now or may be provided by law."

Thus it will be seen that the educational funds are excepted from the provisions of Sections 1 to 5, inclusive. But Sections 6, 7 and 8 include the educational fund, and provide as follows:

"Section 6. The state treasurer may designate a bank or trust company in the City of Salem or a bank or trust company in the City of Portland as an active depository for the collection of any drafts,

checks, certificates of deposit and coupons that may be received by him on account of any claim due the state.

"Section 7. The bank or trust company, designated as such active depository, shall be required to give security to the state to be approved by the state treasurer for the prompt collection of all drafts, checks, certificates of deposit, coupons that may be delivered to such active depository by the state treasurer for collection; also, for the safe keeping and prompt payment on the state treasurer's order of all such collections, also for the payment of all drafts that may be issued to said state treasurer by such active depository.

"Section 8. The state treasurer, on receipt of any draft, check, or certificate of deposit, on account of state dues, may place the same in such active depository for collection, and it shall be the duty of such active depository to collect the same without delay, without charge for its services for such collection, or for exchange, and to notify the state treasurer when collected. The compensation to be paid by such active depository shall be fixed by the state treasurer upon the best terms obtainable for the state."

Section 10 contains the following clause:

"The state treasurer shall not be liable personally or upon his official bond for any moneys that may be lost by reason of the failure or insolvency

of any bank which becomes a depository under this act."

The purpose of this statute is to secure to the state interest on state funds, and to provide depositories for state moneys. Of this act Sections 1 to 5 inclusive, relate to the creation of depositories and payment of interest on money deposited, and applies to all state funds other than educational funds, but has no application to them. Sections 6, 7 and 8 provide for active depositories, and apply equally to the general and educational funds. It is evidently not the purpose of these sections that the active depositories shall loan or be required to pay interest on funds deposited thereunder, as Section 5 provides for the security that shall be taken from general depositories, and if the active depositories could loan funds deposited therein, under the provisions of Sections 6, 7 and 8, the effect would be to nullify the requirements of Section 5 as to the character of the security to be given for the general deposits. The writer is unable to understand the purpose of the last clause of Section 8, unless it is to give to the state the benefit of any deal that the treasurer might be able to make for compensation. But whatever the intention, it can not change the meaning of these sections.

Thus it appears that deposits, if they may be called such, in the active depositories, as provided in Section 6, are made for an entirely different purpose than those provided for in Section 3, and

are only for a special purpose, namely, for the collection of the checks and drafts transmitted by the treasurer, the safe keeping and prompt payment of the money upon the treasurer's order. For the security of funds of the general depositories the state treasurer may require securities, such as United States, state, or municipal bonds, described in Section 2, or a bond executed by a surety company, for which a form is prescribed and conditions specified. But as to the security that may be required of an active depository, no specification is made or bond provided for, or other requirement, except that it must be such United States, state, or municipal bonds, specified in Section 9 as shall be approved by the treasurer, and conditioned for the prompt collection of checks and drafts, for the safe keeping of the money collected, and prompt payment thereof, on the treasurer's order. These are very different conditions from those provided by Section 5 for general depositories. It is not in the power of the legislature to make provision for a loan or use of educational funds. Section 5, Article VIII, of the Constitution of Oregon, provides that "the governor, secretary of state, and state treasurer, shall constitute a board of commissioners for the sale of school and university lands, and for investment of funds arising therefrom." In the light of this constitutional provision, we can have no doubt as to the intention of the legislature in excluding educational

funds from the operation of Sections 1 to 5 of the act of 1907. The active depositories hold the money only as collections, and therefore the deposits were special, the title to which did not pass to the bank. Multnomah County v. Oregon National Bank (C. C.), 61 Fed. 912; State ex rel. v Thum, 6 Idaho, 323 (55 Pac. 868); Sexton v. School District No. 34 of Spokane County, 9 Wash. 6 (36 Pac. 1052); Merchants Nat. Bank v. School Dist. No. 8, 94 Fed. 705 (36 C. C. A., 432).

Counsel for defendant cite Baker v. Williams' Banking Co., 42 Or. 213 (70 Pac. 711), as decisive of the rights of the treasurer to make a general deposit of the educational fund, but the question involved here did not arise in that case, and could not, as we are now controlled by the statute of 1907. The character of deposits must be determined by this statute. Section 11 makes it a felony for the treasurer to remove or deposit the state money except for lawful payments "or for the purpose of depositing the same under the provisions of this act" in banks which shall have qualified as depositories, and this manner of deposit is exclusive. Both the treasurer and the Trust Company in June, 1907, recognized and acted under this statute by creating the active depository and segregating the educational funds. Nebraska has a statute similar to Sections 1 to 5 inclusive, of this statute, but it does not except the educational funds, and in State v. Bartley, 39 Neb. 353 (58 N. W. 172;

23 L. R. A. 67), under a constitutional provision similar to ours, it is held that a deposit by the state treasurer in such a depository is a loan, and that the statute is therefore void, in so far as it attempts to include educational funds. And in considering whether a deposit of the educational fund under that law, might not be considered a deposit, for safe keeping, the court, referring to the contention of counsel for plaintiff to that effect, say: "This construction would be a reasonable and proper one, if the deposit contemplated by the statute was a special one, merely for safe keeping, and that the same identical money should be returned. But this is not the kind of deposit the legislature meant." Our statute has gone further, and provided how the educational fund shall be deposited by excepting it from the general deposit authorized by Sections 1 to 5, and providing for the collection of checks and drafts, and the safe keeping of money so collected, subject to the order of the treasurer. This statute constitutes a part of the terms and conditions of the appointment of the depositories, and must be read into any arrangement made thereunder for deposits. State v. Bartley, 39 Neb. 353 (58 N. W. 172; 23 L. R. A. 67, 72); Merchants Nat. Bank v. School Dist. No. 8, 94 Fed. 705 (36 C. C. A. 432), is very much in point upon this question, where it is said: "The bank had knowledge of the nature of the funds, and was chargeable with

knowledge of the statute. * * * The bank undertook to receive the money as a trust fund for an express purpose, and for no other. It is immaterial that in the finding the deposit is designated a 'special deposit.' The true nature of the transaction is disclosed by the facts. The money was to be treated as the funds of the school district, and not as the funds of the bank, and in the light of that understanding, it is clear that the bank had no right to commingle the money with other funds." Also State v. Thum, 6 Idaho, 323 (55 Pac. 858) is in point. It is there provided by statute that a deposit in a bank of state money, otherwise than on special deposit, shall be punished by imprisonment. It is held that this is authority to the treasurer to make special deposits, and that upon such a deposit the bank had no authority to mingle or use the money so deposited.

2. Defendant further urges that the proof shows only a deposit and conversion of checks and drafts, and not money as charged in the indictment, and that this is a variance. The bill of exception shows that the treasurer sent by mail to the Trust Company for collection checks and drafts. When these were paid by the banks on which they were drawn, the Trust Company thereby received the money for the credit of the treasurer, and it is immaterial how they were paid. There is no suggestion in the record that the Trust Company did not receive the money. On the contrary, upon the

receipt of the check "No. 319, Geo. A. Steel, treasurer, upon you, $272,449.02," and check "No. 34, Geo. A. Steel, state treasurer, on Ladd & Tilton, $2,800," the Trust Company opened an account on its books, entitled "Geo. A. Steel, treasurer, educational," and credited that account with a deposit of those amounts—$272,449.02. This is an acknowledgment that it received from itself and from Ladd & Tilton that amount of money for that account upon those checks. And the same is true of every other credit made, and constitutes at least prima facie proof of the receipt of the money. In State v. Neilon, 49 Or. 163 (73 Pac. 321), defendant was prosecuted under this statute for the conversion of state money. The proof was that he received checks and drafts. Mr. Justice Bean, in the opinion, says:

"It is true that the bill of exceptions recites that there is no evidence as to what was done by the defendant with the checks and drafts; but, in the absence of a showing to the contrary, the jury were justified in finding that they were by the defendant converted into money on the presumption that the usual course of business was pursued. Section 738, Subd. 26, B. & C. Comp."

Morse, Banks and Banking, Section 451, says:

"A credit given for the amount of a check by the bank upon which it is drawn is equivalent to, and will be treated as, a payment of a check. It is the same as if the money had been paid over the

counter on the check, and then immediately paid back again to the account."

This language is quoted with approval in Bartley v. State, 53 Neb. 310, 338 (73 N. W. 744, 752) in a case where a similar question arose; and in Merchants' Nat. Bank v. School Dist. No. 8, 94 Fed. 705 (36 C. C. A., 432) the fund was held to be a trust fund and a special deposit, the title to which remained in the school district, though the deposit was made by checks, and the money not paid over the counter or segregated at the time, but placed to the credit of the district on the books of the bank.

3. When the Trust Company placed to the credit of "Steel, treasurer, educational," the amount of a check, it thereby acknowledged that it had received the amount of the check in money, and is at least prima facie sufficient to establish the receipt of the money by the Trust Company. Having decided that the money in the hands of the Trust Company was a special deposit, and the money remained the property of the State of Oregon, and was paid out to other persons than the state treasurer, it follows that this was a conversion of the money.

4. It is contended, however, by defendant, that the proof does not substantiate the charge in the information that defendants were in the possession of the money of the state, but only that it was

in possession of the Trust Company, and that the officers were not personally liable. But the language of the information is "that the defendants on the 9th day of September, 1907, then and there pretending to act for and on behalf of the Title Guarantee and Trust Company, did then and there have in their possession and under their control, as officers and directors of said Title Guarantee and Trust Company, as aforesaid, $238,426.87." The Trust Company is a corporation, an intangible thing, existing only in contemplation of law, a collection of individuals, authorized to act as if they were one. The individuals are its component parts, and the existence of a corporation independently of its stockholders is a fiction. Its rights and duties are the rights and duties of the persons composing it. 1 Morawetz, Corporation, Sec. 1; 3 Thompson, Corporation, Sec. 4009; 7 Thompson, Corporation, Sec. 8140. Thompson says it has the capacity of acting by the collective vote or will of its component members. It can do no act not authorized by its stockholders or directors, and then only within its charter powers. Its head and hands are the head and hands of its directors and officers, and while it acts lawfully within its corporate powers, the natural and individual capacity and responsibility of its directors and its officers as to all matters respecting the object of the incorporation is totally extinct, and what is done is only by and for the corporation; the directors and

officers are not individually liable for its acts. There may be acts for which the corporation will be held criminally liable, but not in any case in which intent is involved, or where the punishment is more than a fine, because other punishment can not be enforced. However, if the officers and directors of a corporation join in a criminal act, as a corporate act, they are jointly liable with the corporation, if it is an act for which the corporation may be prosecuted; and, if it is a felony, the directors and officers are individually liable. It is their criminal act, and not that of the corporation. 2 Morawetz, Secs. 732, 733; People v. Clark (O. & T.), 14 N. Y. Supp. 642; People v. White Lead Works, 82 Mich. 471 (46 N. W. 735; 9 L. R. A., 722). In the latter case the officers were jointly indicted with the corporation for violation of a municipal ordinance and the Supreme Court say:

"All the defendants were properly convicted. As officers of a company, they were jointly responsible for the business. It is not necessary to the conviction that they should be actually engaged in work upon the premises. The work is carried on by employes. The officers and directors are the persons responsible, and therefore the proper ones to be prosecuted."

To the same effect is State v. Great Works Milling & Man. Co., 20 Me. 41 (37 Am. Dec. 38).

Defendant contends that Section 1807, B. & C. Comp., is only intended to punish persons who are

authorized by law to receive money for the state, or into whose hands it comes lawfully, and who convert it, and that Ross was not individually authorized to receive the money. Under the act of 1907 the Trust Company was made an active depository, and therefore authorized to receive it. This it could only do by the hands of its officers; and, if it was a violation of the statute for the Trust Company to convert the money, it was equally so for anyone who did the act for it, or authorized it. The money came into the hands of these defendants, as officers of the Trust Company, lawfully, by virtue of this statute, and they can not be permitted to say that what they did in violation of the statute was not their act, and that therefore they are not responsible. If the acts were done in the name of the corporation by the defendants, then they were accessories, and aided and abetted, and are principals under Sections 1324, 2153, B. & C. Comp.; 3 Thompson, Corporations, Sec. 4114; 4 Thompson, Corporations, Sec. 4996; 21 Am. & Eng. Enc. Law (2d ed.), 896; State v. Moran, 15 Or. 262 (14 Pac. 419); State v. Steeves, 29 Or. 95 (43 Pac. 947). Thompson, Corporations (Vol 3, Sec. 4014), says:

"It is the duty of the directors and other officers of a corporation to preserve its property as a trust fund of which they are the guardians, and to administer it for the purpose of the trust."

And at Section 4113 he says:

"In a moral sense they are the custodians of the funds committed to their care by the stockholders and the depositors."

These two sections are only discussing their civil responsibility, but it indicates their relation to the funds, and we conclude that the directors and officers of the bank, who used or authorized the use of the money by the Trust Company, are guilty under this statute.

5. Counsel for defendant also urge that the evidence does not tend to establish a conversion of the money by defendant to his own use, namely, that it is not sufficient to show that the funds were converted for the benefit of the Trust Company, but must have been to the personal advantage of defendant. We do not so understand the law of conversion. The statute uses the expression "shall in any way convert to his own use any portion thereof." That is what we understand the term "conversion" to mean, when applied to a wrongful appropriation for which trover will lie, namely, assuming upon one's self the property and right to dispose of another's goods without authority. The cases of Mills v. State, 58 Neb. 263, 271 (78 N. W., 761) and State v. Foust, 114 N. C. 842 (19 S. E., 275) cited by defendant as making a distinction between conversion to one's own use and to the use of another, both intimate that the term quoted may not include a misappropriation. But the Ne-

braska statute includes both forms of expression "convert to his own use or to the use of another." Therefore, it might be held that the legislature meant to limit the meaning of the former. But both of these cases are decided upon the term "embezzled," and not upon the expression "convert to his own use." The opinions in some civil cases, in defining what constitutes conversion say that it is not necessary that the conversion be to the use of the converter. But the term "conversion," as used in law courts, means "conversion to one's own use." Johnson's Universal Cyc. says conversion in law has two meanings. "(2) In the law courts * * * conversion lies at the foundation of the common-law action of trover, which word is derived from the French word 'trover,' to find. There is a legal fiction that the defendant found the plaintiff's property and converted it to his own use. The material part of the case is the conversion." 1 Chitty, Pleading, 145, says: "The action of trover or conversion was, in its origin, an action of trespass on the case for the recovery of damages against a person who had found goods and refused to deliver them on demand to the owner, but converted them to his own use." Lord Mansfield says: "In form it (trover) is a fiction; in substance it is a remedy to recover the value of personal chattels wrongfully converted by another to his own use." 1 Chitty, Pld., 146. In 3 Esc. Laws of Eng., 330, the same language is used in defin-

ing the origin and meaning of the term "conversion," namely, as conversion to one's own use and the averment of "finding," being only a fiction, has been dropped, and the action is now known as "conversion."

We find no decision or text book, nor is any cited by defendant, that attempts to define the meaning of the term "convert to his own use" when used in a criminal statute. Such conversion does not, in itself, constitute a crime. The definitions in the dictionaries and text books relate to acts that constitute a conversion for which trover will lie. A conversion, in the ordinary sense of the word, may be accomplished by one lawfully in possession of goods of another, when the conversion is by authority and for the benefit of the owner, and this creates no liability. But when used in its legal sense, the conversion must be for one's own use. In Baldwin v. Cole, 6 Mod. *212, Lord Holt says:

"What is a conversion but an assuming upon one's self the property and right of disposing of another's goods, and he that takes upon himself to detain another man's goods from him, without cause, takes upon himself the right of disposing of them."

"An appropriation of, and dealing with, the property of another as if it were one's own, without right." Webster. Under the heading, "Appropriation to convertor's use" (2 Words and Phrases,

1564) it is said: "Any direct act of dominion, wrongfully exercised over one's property in denial of his right or inconsistent with it, is a conversion" —citing many authorities. See 9 Bacon's Abr. 631. To the same effect is the definition given by Mr. Justice Lord in the opinion in Budd v. Multnomah St. Ry. Co., 12 Or. 271 (7 Pac. 99: 53 Am. Rep. 355.) Fowler v. Hollins, 41 L. J. (1872) 277, is a leading English case on this subject, and the court, in the opinion, uses the word "convert" as the equivalent of "convert to his own use." See, also, a leading article in 13 Cent. Law J. 185, copied from Solicitor's Journal, London. West Jersey R. R. Co. v. Trenton Car Works Co., 32 N.J.L., 517. The term "convert to his own use" is not descriptive of crime, but is used in criminal statutes as a legal term with a definite meaning, well understood, and is equivalent to the legal term "conversion," and this is the "conversion to his own use" of our criminal statute, which declares that such a conversion of state money, by one who has received it for the state, shall constitute larceny.

We have six criminal statutes that make conversion of personal property of another "to one's own use" a crime; and, if it be necessary for the state to prove that the conversion is for the personal advantage of the defendant, there would be a failure of justice in many cases. Every assuming by one person to dispose of the goods of another, without right, as if they were his own is a conversion to

one's own use. This is not extending the statute by inference or construction, but giving to the words the technical meaning they bear in the law. Laverty v. Snethen, 68 N. Y. 522 (23 Am. Rep. 184), makes the distinction between conversion to the use of the owner and to one's own use, and says:

"Trover may be maintained when the agent has wrongfully converted the property of his principal to his own use, and the fact of conversion may be made out by showing either a demand and refusal, or that the agent has, without necessity, sold or otherwise disposed of the property contrary to his instructions. * * * If the agent parts with the property in a way or for a purpose not authorized, he is liable for a conversion."

We understand from these authorities, and many others we have examined, that, in relation to trover, the term "conversion" necessarily means conversion to one's own use, and is fully accomplished by any exercise of a dominion over a chattel without the authority of the owner, whereby the true owner is deprived of the enjoyment of his chattel. And it is wholly immaterial whether the person so converting did it for his own personal advantage or not. See also State v. Omaha Nat. Bank, 59 Neb. 483 (81 N. W. 319).

6. One other question remains: Does the evidence tend to show that Ross, as a director or president, participated in, or was a party to, the conversion? "Officers, directors, and agents of a cor-

poration, participating in a violation of law in the conduct of the company's business may be held criminally liable therefor." 21 Am. & Eng. Enc. Law (2d ed.) 896. We think there can be no question of the correctness of this statement. It is equally true that an officer of a corporation is not criminally liable for the unlawful act of the corporation unless he participated in the wrongful act. In Rex v. Hayr, 14 Ont. L. R. 201, it is said that, "in the absence of a statute to the contrary, an officer of a corporation can not be punished criminally for the corporation's unlawful act or default, unless he participates therein as an aider, abettor, or accessory, even though the corporation's defense consist of the violation of a statute which imposes imprisonment as a penalty." There is a note to this case in 8 Am. & Eng. Ann. Cas. 883, in which the author says: "The question of the criminal liability of the officers of a corporation for its acts of nonfeasance seems seldom to have arisen. The weight of modern authority * * * is apparently as laid down in the reported case, viz., that an officer of a corporation is not liable for an offense committed by the corporation, except where he has in some way participated in the illegal act as an aider, abettor, or accessory"—citing several cases to that effect. 3 Thompson, Corporations, Sec. 4134, citing People v. Clark (O. & T.), 14 N. Y. Supp. 942, is to the same effect. There is no evidence in this transcript tending to show that

Ross actually paid out for the Trust Company any of its money, or expressly authorized any one to do so. There is no doubt that if the money had been embezzled from the Trust Company, or applied in any way not intended by the company, or not for its benefit, by any subordinate, then Ross could not be held criminally liable, unless he participated in such diversion thereof, but that is not the case. The record tends to show that the money was in the general deposit funds of the Trust Company, and was paid out in the usual way in payment of legitimate claims against the Trust Company; that is, in the manner contemplated and intended by the company, and those in direction of its affairs. The agents actually paying out the money had a right to understand that this was to be done; there being no segregation of the money or limitation on the use of it. The Trust Company could only become an active depository of this fund by authority of its officers and board of directors. When the money was received by the company as an active depository, and its directors and officers permitted the money to become a part of the general deposit of the company, without restriction thereon, with knowledge that in so doing the money would be applied to the Trust Company's general uses, this was general authority to subordinates to pay it out in the usual course of the business, and these officers and directors are liable therefor. The evidence tends to show that the dis-

position of the money by the Trust Company was with their knowledge, consent, and acquiescence, and they thereby participated in its diversion. To this effect is 4 Thompson, Corporations, Sec. 4996.

This disposes of the principal questions involved. There are some minor questions raised, namely:

7. Exception was taken to the admission of evidence relating to Ross' knowledge of the bill pending before the legislature of 1907, which authorized the appointment of depositories. This evidence only tended to establish Ross' knowledge of the statute and its terms, and was not prejudicial.

8. Exception was taken to the admission in evidence of the demand made upon the Trust Company. This we think was competent and consistent with the charge in the information that defendants had the money in their control as officers and directors of the Trust Company, and a demand upon the Trust Company for which the defendants were acting was sufficient.

9. However, a demand, in case of conversion, is only necessary in case the conversion is not otherwise made to appear. Here the conversion was disclosed by proof that the money was paid out on liabilities of the Trust Company.

10. The proof offered by defendant to show absence of criminal intent was immaterial, as it only tended to show that, after the money was con-

verted, the Trust Company gave the treasurer collateral security. Such security is contemplated in the act of 1907, and when given did not condone the wrongful act.

11. The proof of loss through failure of the Oregon Trust and Savings Bank was incompetent, as the money—being a special deposit—should not have been involved in the dealings between the Trust Company and its creditors.

12. Neither is criminal intent involved under this statute, as we have shown in defining a conversion. Such a conversion, when committed in violation of the terms of this statute (Section 1807), constitutes the offense, and no other intent need be shown.

13. Exception was also taken to remarks made by the district attorney and the judge, in presence of the jury, in permitting leading questions by the state to its own witness. When the district attorney was cautioned by the court not to cross-examine his own witness, he appealed to the court as follows: "I must invoke the rule in this case that the witness is an unwilling one"—to which the court replied: "I see that the witness is unwilling." Certainly the district attorney had a right to make such an appeal to the court if the conduct of the witness justified it, and any form of ruling by the court allowing the attorney's question would have meant the same to the jury, as the language used, and was not error.

14. Exception is also taken to the portion of the judgment that commits defendant to the county jail until the fine is paid, for the reason that the same is cruel and unusual under the prohibition in the constitution. Defendant was sentenced to five years in the pentientiary, to pay a fine of $576,853.74, and to be imprisoned in the county jail one day for every $2 of the fine, not exceeding 288,426 days. This is an unusually large fine, and the imprisonment is for life, for the non-payment of the fine, and is a cruel and unusual punishment within the prohibition of the constitution. State v. Miller, 75 N. C. 73; State v. Driver, 78 N. C. 423; Frese v. State, 23 Fla. 267 (2 South. 1); in re Yell, 107 Mich. 228 (65 N. W. 97); Southern Express Co. v. Walker, 92 Va. 59 (22 S. E. 809: 41 L. R. A. 436); State v. Whitaker, 48 La. Ann. 527 (19 South. 457; 35 L. R. A. 561).

15. There can be no question that a sentence may be excessive, even though within the maximum of the statute, but if excessive, it is within the power of the appellate court to enforce this provision of the bill of rights, and avoid the judgment so far as it is excessive. Mims v. State, 26 Minn. 494 (5 N. W. 369); Southern Express Co. v. Walker, 92 Va. 59 (22 S. E. 809; 41 L. R. A. 436); Frese v. State, 23 Fla. 267 (2 South. 1); State v. Butman, 15 La. Ann. 166. And the judgment and sentence of the lower court will be modified by reversing that part directing that "he be imprisoned

in the county jail of Multnomah County, Oregon, until said fine is paid, not exceeding 288,426 days." In all other respects the judgment is affirmed.

Modified: Affirmed.

ON MOTION FOR REHEARING.

Mr. Justice Eakin delivered the opinion of the court.

Mr. Justice King dissenting.

16. A petition for rehearing has been filed in this case by counsel for defendant, another by Carey & Kerr, on the ground that they are employed in cases involving some of the same questions, and another by Joseph Simon and twenty other leading members of the bar, solely as amicus curiae, on account of the public importance of the decision. The ground upon which the motion is based is error of this court in the application of the law to this case as disclosed in the opinion, and is principally a review of the questions discussed therein.

Counsel for defendant and Carey & Kerr insist that the act of 1907 (Laws 1907, p. 248) has no application to the educational fund, and that the treasurer has the right to make general deposits of that fund in any bank, as held in Baker v. Williams, 42 Ore. 223 (70 Pac. 711), independent of that act, while it is contended in the petition of Joseph Simon et al., that by Sections 6, 7 and 8 of the late law a general deposit of that fund in the

active depository is authorized. We have re-examined the questions involved with the aid of the briefs submitted with these applications, and adhere to our first views. Sections 1 to 5 make provision for deposits, clearly contemplating that the deposits shall be general, and requiring the treasurer to deposit all state funds, except the educational fund, in the general depositories. The collections made by the active depository upon checks and drafts for the general funds cannot be left there by the treasurer, but must be transferred to the general depositories. This obligation is as binding on him as that he shall not retain the money in his office. Instead of exempting the educational funds from the terms of the act, Section 10 provides that the term "funds," as used in the act, shall not include the educational funds, and that nothing in the act shall be construed to deprive the state land board of power over this fund, thus indicating that it is to be governed by the provisions of the act, save where it is excepted therefrom, and Sections 6, 7 and 8 seem to have special reference to the educational fund. The decision in Baker v. Williams, 42 Ore. 223 (70 Pac. 711) is not here questioned. No doubt the legislature had that decision in mind when it adopted the present law, seeking thereby to guard the educational fund by expressly excluding it from a general deposit. Section 6 is not uncertain as to what funds may be collected thereunder when it says that it is for the collection of

any drafts, checks, and certificates that may be received by the treasurer "on account of any claim due the state." Secs. 3 and 4 fix the minimum rate of interest to be paid by the general depositories, and provide that the rate agreed upon shall not be changed for a year, and shall be computed on daily balance and paid quarterly, and that the bank shall render an account the first of every month, showing daily balances. And the condition of the security given is that all of these things shall be done, while the security required under Section 7 is conditioned only for the prompt collection, the safe keeping, and the prompt payment on the treasurer's orders of the proceeds of such collections and for the prompt payment of its own drafts. This does not include statements, nor contemplate interest. The conclusion is unavoidable that this act only contemplates general deposits of funds other than the educational, and for which interest shall be paid. It was evidently the purpose of the legislature by these provisions to take the educational fund out of that custom or right of the treasurer to make general deposits as recognized in Baker v. Williams, 42 Ore. 223 (70 Pac. 711). The clause in Section 8, to the effect that the compensation to be paid shall be fixed by the treasurer, does not require him to exact a compensation as a condition for the deposit nor is such requirement made a condition upon which the bank shall be appointed an active depository. In the opinion we cited some cases holding

that in case of a special deposit the money may not be mingled by the bank with its own funds, yet we did not intend to decide that question, deeming it unnecessary since the conversion was proved independent of such commingling; but the fact that the bank does so mingle a special deposit can not deprive the owner of his rights as such. Woodhouse v. Crandall, 197 Ill. 104 (64 N. E. 292; 58 L. R. A. 385). It is not held in the opinion that the trust company or the defendants were officers of the state, but the act of 1907 authorizes their possession of state money for the state, and they come fully within the class of persons mentioned in Section 1807, B. & C. Comp., which includes more than state or municipal officers, viz., "any person who shall receive any money whatever for this state." When the treasurer deposits the money, as directed by the act of 1907, his personal liability therefor is terminated, although it is still subject to his disposal. The depository does not receive the money for him, but for the state; that is, by express direction of the law and not at the option of the treasurer. The Trust Company and defendants did receive this money for the state by special authorization, and are as clearly within the very words of the statute as the treasurer would be.

17. Section 1805, B. & C. Comp., defining embezzlement, relates to the fraudulent conversion by an officer, agent, or clerk of a private person or incorporation, and does not apply to one in possession

of public money, and Section 1807 relates especially to public moneys that are misappropriated. This is not a case where some other officer converted the money and defendant is held responsible for that act by reason of his relation to the bank. There is nothing in the record to disclose that any other officer wrongfully converted the money. The cashier or teller who paid out the money was not offender, unless he was aware of the source from which the money came and the capacity in which it was held. The wrongful act was done by the officers and directors who made the arrangement to receive the special deposit and permitted it to be mingled with its general deposit without restriction upon its use. A depository is only created upon the bank's application in writing, accompanied by a sworn statement of the condition of the bank, which must be approved by the treasurer. This can only be consummated through the board of directors. It is a contract between the state and the bank of which the statute is a part to the effect, among other things, that the educational fund is a special deposit, and mingling it with its general funds without restriction is the wrongful act that resulted in the conversion. Judge Redfield in a note to the case of United Society of Shakers v. Underwood, 13 Am. Law Reg. (N. S.) 211, in which he criticises that decision, states the liability of the bank and its officers in case of a special deposit, and says:

"But, as said in Foster v. Exeter Bank, supra (37 Mass. 479; 9 Am. Dec. 103), it would be a breach of trust for the bank or any of its officers to open a package left on special deposit, and whoever did or committed such act would be responsible to the owner for such tort. And, if done by an officer of the bank for its use and benefit, there can be no doubt the bank would be responsible. * * * The books all show that such officers and servants are liable to the owner of such special deposits for their own wilful acts."

Such acts, resulting in the diversion of the money, constitute the conversion.

18. Defendant now, for the first time, questions the sufficiency of the indictment, in that it does not allege that the Trust Company was an active depository or that it sustained any official relation to the state. The allegation is in effect that the defendants, acting for the Trust Company, did then and there have in their possession $238,426.87 which belonged to the State of Oregon, and was part of the educational funds of the state, deposited for the state for safe keeping, to be returned by defendants to the State of Oregon. The general rule is that, when the statute sets out what acts shall constitute the offense, it is generally sufficient in the indictment to charge the offense in the substantial words of the statute. This rule has its exception, which is, that the elements of the

crime sufficient to inform the defendant of the charge he is called upon to answer should be set out. As defined in State v. Dougherty, 4 Ore. 305, the indictment is sufficient if it contains such specification of acts and descriptive circumstances as will upon its face fix and determine the identity of the offense, and enable the court by an inspection of the record alone to determine whether, admitting the truth of the specific acts charged, a thing has been done which is forbidden by law. The indictment, we think, fully complies with this requirement. There is nothing left doubtful as to the particular acts constituting the offense. It states that the money was part of the educational fund of the state placed in defendant's possession for the state for safe keeping, which shows a lawful possession and comes within the words of the statute. State v. Lee, 17 Ore. 488 (21 Pac. 456); State v. Sam, 14 Ore. 347 (13 Pac. 309).

10. Defendant's counsel contend that the charge against defendant was made by information filed March 6, 1906, and not by indictment, and that by the amendment of Section 12, Article VII, Constitution of Oregon, at the June, 1906, election it is provided that no person shall be charged in any circuit court with the commission of any crime except upon indictment found by a grand jury; that such amendment operated to repeal Sections 1263 to 1264, which provide for trial upon information by the district attorney, and there being no saving

dance in the amendment to the constitution the Appellate Court is by the amendment divested of jurisdiction. This question was before this court in State v. Jurgens, 56 Ore. 1 (98 Pac. 813), in which it is held that the constitutional amendment is only prospective and does not apply to pending cases, and we adhere to that view. If, as contended by defendant, the provisions of Sections 11 and 12 of the act of 1907 operate to repeal Section 1807, B. & C. Comp., so far as there is a conflict as to the penalty, yet they only relate to acts of the treasurer and not to the depository, and Section 1807 is unaffected thereby so far as it relates to the offense charged in this information.

20. Counsel again call our attention to the excessiveness of the fine, viz., $576,853.74, and upon further consideration we believe that the fine is excessive within the contemplation of the constitutional provision quoted in the opinion. The fine and the imprisonment for non-payment thereof, adjudicated by the trial court, were within the terms of the statute and in compliance with its direct command, but we are of the opinion that, the fine being so great, it is apparently beyond the power of the defendant to pay it at this time or even during a lifetime of effort, and is such a one as is inhibited by the Constitution.

The judgment of the lower court will be modified by reversing that part thereof adjudging that

defendant pay a fine of $676,853.74, and that he be imprisoned in the county jail of Multnomah County, Oregon, until said fine is paid, not exceeding 288,426 days. In all other respects the judgment is affirmed.

Modified on rehearing. Affirmed.

Mr. Justice King delivered the following dissenting opinion:

I concur in the holding by the majority respecting the unconstitutionality of the fine and jail sentence imposed; but after a careful re-examination of the able briefs and argument therein of the respective counsel, including those on petition for rehearing, I am unable to agree with the conclusion announced respecting the other, and decisive, points presented. I accordingly record my dissent therefrom.

STATEMENT OF FACTS.

The plaintiff in error was charged by information filed by the district attorney of Multnomah County on March 6, 1908, with the crime of larceny committed in Multnomah County, Oregon, by converting to his own use $288,426.87, a part of the educational funds of the State of Oregon.

The substance of the charge was that on the 9th of September, 1907, the Title Guarantee and Trust Company (hereafter referred to as the Trust Company) was a corporation carrying on a banking business, of which the plaintiff in error was presi-

dent and one of the directors, and that on that date plaintiff in error and other directors and officers of the Trust Company had in their possession and control for safe keeping as officers and directors of the Trust Company $268,426.87 belonging to the State of Oregon and being a part of the irreducible school fund, the agricultural college fund and the university fund (hereafter referred to as the educational fund); that plaintiff in error, well knowing that such money belonged to that fund, did then and there wilfully, unlawfully and feloniously convert the same to his own use, which money prior to that date the plaintiff in error, as an officer of the Trust Company, together with other officers of the company, had received for the state for safe keeping from George A. Steel as state treasurer.

On the 14th day of January, 1907, George A. Steel took the office of state treasurer of the State of Oregon, and at that time had $35,000 deposited with the Trust Company subject to his check, which money belonged to the State of Oregon. At that time there was no segregation of the funds of the treasury as between the educational and general funds except on the books of the treasurer, and the Trust Company had not been notified as to which fund the deposit belonged. That on the 3d day of June, 1907, the Trust Company was designated by the state treasurer as an active depository of the state, under the provisions of Section 6 of an act of the Legislative Assembly of the State of Oregon

adopted in the year 1907, providing for state depositories for state funds (Laws 1907, p. 249), at which time the state treasurer segregated the funds and wrote to the Trust Company as follows:

"State of Oregon, Treasury Department,
Salem, June 3, 1907.

The Title Guarantee and Trust Company, Portland, Oregon:

Gentlemen—I inclose herewith for credit of Geo. A. Steel, state treasurer, educational, the following checks:

No. 319, Geo. A. Steel, state treasurer, on you	$272,449.02
No. 34, Geo. A. Steel, state treasurer, on Ladd & Tilton	2,600.00
Total	$275,049.02

Yours very truly,
GEO. A. STEEL,
State Treasurer."

Thereupon on the 5th day of June, 1907, an account was opened on the books of the Trust Company, entitled "George A. Steel, treasurer, educational," and on November 6, 1907, the balance to the credit of that account was $288,426.87. Until the 20th day of August, 1907, the Trust Company always had on hand cash exceeding the balance due

from it on the educational account. On November 8, 1907, the Trust Company's cash on hand lacked $274,999.73 of being equal to the balance due on said account, and on that date all its cash was turned over to the receiver. A written demand was made by the state treasurer on the Trust Company for the amount of such account on November 12, 1907, service of which was accepted for the Trust Company by plaintiff-in-error Ross as president.

The trial resulted in a verdict against the plaintiff in error of guilty and a finding by the jury that the amount of money converted was $288,426.87. Thereupon judgment was rendered against plaintiff in error that he be imprisoned in the penitentiary of the State of Oregon for the term of five years; that he be adjudged to pay a fine in the sum of $576,853.74, and that in default of the payment of the fine he be imprisoned in the county jail of Multnomah County one day for each two dollars of the fine, not exceeding 288,426 days, and that the state recover of and from the plaintiff in error its costs and disbursements. From this judgment and sentence plaintiff in error appealed to the Supreme Court of Oregon, which is the highest court of said state, which court affirmed the judgment of conviction but modified the sentence by annulling all of it except the five years' imprisonment in the state penitentiary.

Pending the appeal of plaintiff in error to the Supreme Court of Oregon an amendment to the

Constitution was adopted and became effective, which took away the power of district attorneys to file informations, and provided that no person should be charged in any Circuit Court with the commission of a crime except upon indictment found by a grand jury. After the said appeal was decided by the Supreme Court of Oregon plaintiff in error filed with said court a petition for a rehearing, in which for the first time he contended that the said constitutional amendment divested the court of jurisdiction to proceed further in his cause, and that the enforcement of the sentence against him would deprive him of his liberty without due process of law, and he invoked the fourteenth amendment for his protection, and raised the question as a federal question, which is the only federal question that the plaintiff in error presented to the Supreme Court of Oregon. Upon this question the Supreme Court of Oregon ruled that the constitutional amendment operated prospectively and not retrospectively, and that it did not affect pending causes but applied only to accusations made subsequent to the taking effect of the amendment.

State of Oregon, County of Multnomah, ss.

I, Martin L. Pipes, being first duly sworn, depose and say that I am one of counsel of defendant in error; that I prepared the foregoing statement

of facts, and that the same is true, as I verily believe.

(Signed) Martin L. Pipe

Subscribed and sworn to before me this 2.1. day of June, 1912.

(Signed) A. M. Cannon,

Clerk United States District Court
District of Oregon
Notary Public for Oregon.

In presenting our argument upon this motion we rely upon the following propositions of law:

I.

The Supreme Court has no jurisdiction to review the decision of a state court except upon a federal question specially set up or claimed in the state court.

Mutual Insurance Co. of New York v. McGrew, 188 U. S. 291.

Michigan Sugar Co. v. Dix, 185 U. S. 112 (43 L. Ed. 829).

F. G. Oxley Stave Co. v. Butler Co., 166 U. S. 648 (41 L. Ed. 1149).

II.

The construction given to a statute or constitution of the state by the highest court of such state is regarded as part of the statute or constitution,

and is as binding as the text upon the Supreme Court of the United States.

Leffingwell v. Warren, 2 Black 595 (17 L. Ed. 261).

Russell v. Ely, 2 Black 575 (17 L. Ed. 258).

Oaks v. Mace, 165 U. S. 363 (41 L. Ed. 746).

Stone v. Wisconsin, 94 U. S. 181 (24 L. Ed. 102).

Sumner v. Hicks, 2 Black 352 (17 L. Ed. 355).

Adams v. Nashville, 95 U. S. 19 (24 L. Ed. 369).

Nobles v. Georgia, 168 U. S. 398 (42 L. Ed. 515).

New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431 (39 L. Ed. 1042).

Baltimore Traction Co. v. Baltimore Belt R. Co., 151 U. S. 137 (38 L. Ed. 102).

Olcott v. Fond du Lac Co., 16 Wall. 678 (21 L. Ed. 382).

Missouri, K. & T. R. Co. v. McCann, 174 U. S. 586 (43 L. Ed. 1096).

Waters-Pierce Oil Co. v. Texas, 177 U. S. 28 (44 L. Ed. 657).

Tullis v. Lake Erie & Western R. Co., 175 U. S. 348 (44 L. Ed. 192).

Iacardi v. Alabama, 19 Wall. 626 (22 L. Ed. 215).

Fairfield v. Gallatin Co., 100 U. S. 47 (25 L. Ed. 544).

Morley v. Lake Shore & Michigan Southern R. Co. 146 U. S. 162 (36 L. Ed. 925).

Louisiana v. Pillsbury, 105 U. S. 294 (26 L. Ed. 1035).

III.

The construction of the state court that a statute under which a person has been convicted is prospective only will be followed in the federal court on the question whether or not the statute is an ex post facto law.

Jaehne v. New York, 128 U. S. 190.

In re Jaehne, 35 Fed. Rep. 367.

IV.

An ex post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed.

Calder v. Bull, 3 Dall. 386 (1 L. Ed. 648).

Mallet v. North Carolina, 181 U. S. 590.

V.

The constitutional provision against ex post facto laws applies only to criminal or penal statutes.

Ogden v. Sanders, 12 Wheat. 213 (6 L. Ed. 606).

League v. Texas, 184 U. S. 161 (46 L. Ed. 481).

Calder v. Bull, supra.

Locke v. New Orleans, 4 Wall. 172 (18 L. Ed. 334).

VI.

The constitutional provision that no state shall pass an ex post facto law refers to a legislative enactment and not to a judicial decision.

See cases under Proposition VII.

VII.

A contract can only be impaired within the meaning of the United States Constitution so as to give this court jurisdiction on writ of error to a state court by some subsequent statute of the state which has been upheld or given effect by the state court.

Bacon v. State of Texas, 163 U. S. 207 (41 L. Ed. 133).

New Orleans Water Works Co. v. Louisiana Sugar Ref. Co., 125 U. S. 118 (31 L. Ed. 607).

Central Land Co. v. Laidley, 159 U. S. 103-109 (40 L. Ed. 91-93).

Turner v. Board of Commissioners of Wilkes County, 173 U. S. 461 (43 L. Ed. 768).

VIII.

The federal Supreme Court will not hold a state statute void on the ground that it impairs the obligation of contracts unless it impairs the obligation of the particular contract which is involved in the controversy.

Lehigh Water Co. v. Easton, 121 U. S. 388 (30 L. Ed. 1059).

For convenience we will hereafter refer to the act of the legislature of Oregon taking effect May 26, 1907, being Chapter 185 of the Laws of 1907, page 248, as the depository law.

No Federal Question.

Calling the court's attention to our first proposition, that a federal question, to be availed of in this court, must have first been specially set up or claimed in the state court, this record will show that only one federal question was raised in the

state court, and that it was raised for the first time upon a petition for a rehearing, and that is the question of due process of law. The question was not properly raised under the rules laid down by this court as to when and how a federal question should be raised, but the Supreme Court of Oregon entertained and decided it, and that is sufficient to give this court the right to consider it. The other federal questions, namely, the question of the ex post facto law and the law impairing the obligation of a contract, were not specially set up or claimed in the state court, but were raised for the first time in the petition for writ of error in this court. For the purpose of showing that a federal question can not be raised in such a manner we quote from the case of Mutual Insurance Company of New York v. McGrew, cited above, briefly:

"Our jurisdiction of this writ of error is asserted under the third of the classes of cases enumerated in Section 709 U. S. Comp. Stat., p. 575, and it is thoroughly settled that in order to maintain it the right, title, privilege or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way.

"The proper time is in the trial court whenever that is required by the state practice, in accordance with which the highest court of a state will not review the judgment of the court below on questions not therein raised. The proper way is by pleading, motion, exception or other action, part, or being

made part, of the record, showing that the claim was presented to the court. It is not properly made when made for the first time in a petition for rehearing after judgment, or in the petition for writ of error, or in the briefs of counsel not made part of the record. If the highest court of a state entertains a petition for rehearing which raises federal questions and decides them that will be sufficient."

In view of this law we claim that the Supreme Court of the United States is precluded from considering the second and third assignments of error.

The fourth assignment of error relates to a ruling of the court in excluding certain testimony. This clearly is not a federal question, and therefore need not be discussed upon this motion.

The fifth assignment of error is simply a conclusion from the other assignments, and would necessarily depend upon the other errors assigned.

So then, as we view the case, the first assignment of error is the only one that can be considered by this court. We will, however, show that the second and third assignments cannot be maintained even if they had been properly raised.

Assignment No. 1—Due Process of Law.

Confining our attention now to the first assignment, the plaintiff in error contends that he was deprived of his liberty without due process of law, for the reason that while his case was pending on appeal before the Supreme Court of Oregon an

amendment to Section 18 of Article VII of the Constitution of the State of Oregon became effective, which he claims repealed the law authorizing district attorneys to file informations and provided that subsequent to the taking effect of the amendment no person should be charged in the Circuit Court except upon an indictment found by a grand jury; that plaintiff in error was tried upon an information filed by the district attorney, and that his prosecution could not be maintained after the amendment took effect, for the reason that he was not being tried upon an indictment found by a grand jury, and the law authorizing the information under which he was being prosecuted was no longer in effect; that the change in the law brought about by the amendment was not merely a change in procedure, of which he could not complain, but went to the jurisdiction of the court and deprived the court of jurisdiction to proceed further in his cause. We do not deem it necessary to discuss whether such change was jurisdictional or not, or was a mere matter of procedure, or whether it operated as a repeal of the law under which plaintiff in error was prosecuted, for the reason that the Supreme Court of the State of Oregon in the case of State v. Ju Nun, above quoted in full, decided that the amendment did not repeal or change the law under which the defendant was tried and convicted, nor make that a criminal act which was innocent when committed, or change the punishment or alter

the rules of evidence, or in any other manner affect any substantial right of the defendant, and that the amendment was a mere change in the procedure, and was prospective and not retrospective, and did not affect pending cases. In other words, the Supreme Court wrote into the amendment by construction a saving clause, the effect of which is exactly the same as if the amendment had specifically excepted from its operation all pending cases. The Ju Nun case was cited, applied and adhered to by the Supreme Court of Oregon in its decision affirming the conviction of plaintiff in error. So that we have two decisions by the highest court of Oregon construing the said amendment and holding that it operates prospectively and can apply only to charges made after the taking effect of the amendment. Under the authorities cited this court is bound to adopt the interpretation of the amendment given by the Supreme Court of Oregon.

In the case Jaehne v. New York, 128 U. S. 190, this court held that it was bound by the decision of the highest court of New York holding that a statute was prospective only.

In Leffingwell v. Warren, 2 Black 595, this court, speaking through Mr. Justice Swayne, said:

"The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. If the highest judicial tribunal of the state adopt

new views as to the proper construction of such a statute and reverse its former decisions this court will follow the latest settled adjudication."

In the case of Oakes v. Mace, 165 U. S. 363, Mr. Justice White delivered the opinion of the court and decided that the ruling of the court of last resort of the State of Montana interpreting the constitution and laws of that state was binding in this court.

In the case of Stone v. State of Wisconsin, 94 U. S. 181, it was held by this court that the construction of the statute and constitution by the Supreme Court of Wisconsin was binding upon the Supreme Court of the United States as a question of statutory and constitutional law.

In Adams v. Nashville, 95 U. S. 19, this Supreme Court decided as follows:

"The Supreme Court of Tennessee hold in the case before us that this statute repeals and overrides the ordinance of exemption, and brings these bonds within the scope of general taxation. This is a decision of a state tribunal upon the construction of its own statutes, which we are bound to respect."

In the case of New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, Mr. Justice Shiras delivered the opinion of the court and said:

"A construction or meaning attributed to the terms of a state statute by the courts of such state

will, of course, be adopted by this court when called upon to decide questions arising under such legislation."

In the case of Olcott v. Fond du Lac Co., 16 Wall. 678, this court, speaking through Mr. Justice Strong, said:

"It is undoubtedly true in general that this court does follow the decisions of the highest courts of the states respecting local questions peculiar to themselves or respecting the construction of their own constitutions and laws, but it must be kept in mind that it is only decisions upon local questions, those which are peculiar to the several states, or adjudications upon the meaning of the constitution or statutes of a state which the federal courts adopt as rules for their own judgments."

In the case of Missouri, K. & T. R. Co. v. McCann and Smizer, 174 U. S. 586, the present chief justice delivered the opinion of the court, from which the following is a quotation:

"The reasoning now relied on, then, is that although the Supreme Court of the State of Missouri has interpreted the statute of that state as not depriving a carrier of power, on receiving an interstate shipment, to limit its liability to its own line, that this court should disregard the interpretation given to the state statute by the court of last resort of the state and hold that the statute means the very contrary of its import as declared by the Su-

preme Court of the state, and upon this construction decide that the state law is repugnant to the Constitution of the United States. But the elementary rule is that this court accepts the interpretation of the statute of a state affixed to it by the court of last resort thereof."

In the case of Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, Mr. Justice McKenna delivered the opinion of the court. We quote from the opinion the following:

"The courts of Texas have like power of interpretation of the statutes of Texas. What they say the statutes of that state mean we must accept them to mean whether it is declared by limiting the objects of their general language or by separating their provisions into valid and invalid parts."

In the case of Tullis v. Lake Erie & Western R. Co., 175 U. S. 348, Chief Justice Fuller delivered the opinion of the court, from which we quote the following:

"As remarked in Missouri, K. & T. R. Co. v. McCann, 174 U. S. 580-6 (43 L. Ed. 1093-6; 19 Sup. Ct. Rep. 755), the contention calls on this court to disregard the interpretation given to a state statute by the court of last resort of the state, and by an adverse construction to decide that the state law is repugnant to the Constitution of the United States. But the elementary rule is that this court accepts the interpretation of a statute of a state affixed to it by the court of last resort thereof."

In the case of Morley v. Lake Shore & Michigan Southern R. Co., 146 U. S. 162, the opinion was delivered by Mr. Justice Shiras. We quote from it at some length:

"The first question we have to consider is the effect to be given to the saving clause contained in the first section of the act of June 20, 1879, which provides that nothing therein contained shall be so construed as to in any way affect any contract or obligation made before the passage of that act. This question is answered for us by the decision of the Court of Appeals of New York in this very case, holding that this saving clause is not applicable in the case of a judgment like the plaintiff's. In Louisiana v. Pillsbury, 105 U. S. 294, this court, speaking by Mr. Justice Field, says: 'Whether such a construction (by judicial decisions upon a clause of the state constitution) was a sound one is not an open question. * * * The exposition given by the highest tribunal of the state must be taken as correct so far as contracts made under the act are concerned. * * * The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend that when a statute of two states, expressed in the same terms, is construed differently by the highest courts they are treated by us as different laws, each embodying the particular construction of its own state, and enforced in accordance with it in all

cases arising under it. The rule of construction adopted by the highest courts of the state, in construing their own constitution and one of their own statutes in a case not involving any question re-examinable in this court under the twenty-fifth section of the judiciary act, must be regarded as conclusive in this court.' Provident Institution for Saving of Boston v. Massachusetts, 73 U. S., 6 Wall. 611, 630. 'The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text.' Leffingwell v. Warren, 67 U. S., 2 Black 599, 603. The meaning of a state statute, declared by the highest court of a state, is conclusive upon this court. Randall v. Brigham, 74 U. S., 7 Wall. 523, 541. If, then, the law is enacted by the legislature and construed by the state judiciary will be the law of the state it follows that as to the proper construction of the statute and as to what should be regarded as among its terms no federal question could arise. The most that could be claimed would be that although the statute of the state was unobjectionable, yet the state court had erroneously construed it. This would constitute a purely judicial error, involving no question of the validity of the law; which latter question alone is, by the plainest possible terms of the constitution and judiciary act, subject to investigation here. Assuming, then, that

the statute in question was correctly construed by the New York court, our only inquiry must be as to the validity of the statute itself as construed by the state court. Did, then, the law that changed the rate of interest thereafter to accrue on a subsisting judgment infringe a contract within the meaning of the Constitution of the United States?"

The case of Fairfield v. Gallatin Co., 100 U. S. 47, shows how far this court will go in upholding the rule we contend for. It appears from that case that this court had construed a section of the Constitution of Illinois without being aware that the same section had been differently construed by the Supreme Court of that state. The question was again brought before this court and it reversed its former holding on the ground that it was bound by the construction given by the state court. Mr. Justice Strong in delivering the opinion, among other things said:

"In Concord v. Bk., 92 U. S. 625, we had occasion to construe this section of the state constitution. We then held that donations by counties or other municipalities to railroad companies were prohibited by it and that they could not be lawfully made after July 2, 1870, though they had been authorized by prior statute and by a vote of the people of the county or municipality before the adoption of the constitution. We were fully aware that it is the peculiar province of the Supreme Court of a state to interpret its organic law, as well as

its statutes, and that it is the duty as well as the pleasure of this court to follow and adopt that court's interpretation. But we were not informed when the case was decided that any judicial construction had been given to the constitutional provision. It now appears that the Supreme Court of Illinois had previously considered it and decided that donations, equally with subscriptions, if sanctioned by a popular vote before the adoption of the constitution, are not prohibited by it, and that they are excepted from the prohibition by the proviso. This was decided by that court in 1874, more than a year before Concord v. Bk. came before us, but the decision was not called to our notice, and it was not reported until 1877. It may now be found in R. R. Co. v. Pinckney, 74 Ill. 277."

Justice Strong, after quoting at length from the opinion of the Supreme Court of Illinois, proceeds as follows:

"In view of all this, ought this court to adhere to the construction we gave to the state constitution in ignorance of the fact that the Supreme Court of the state had previously construed it in a different manner? At a very early day it was announced that in cases depending upon the constitution or statutes of a state this court would adopt the construction of the statutes or constitution given by the courts of the state when that construction could be ascertained. In Nesmith v. Shel-

don, 7 How. 812, it is declared to be the 'established doctrine that this court will adopt and follow the decisions of the state courts in the construction of their own constitution and statutes when that construction has been settled by the decisions of its highest tribunal.' In Walker v. Harbor Comrs., 17 Wall. 648, we said: 'This court follows the adjudication of the highest court of the state in the construction of its statutes. Its interpretation is accepted as the true interpretation, whatever may be our opinion of its original soundness.'"

The foregoing authorities show that this court has always held itself bound by the decision of the state court in the interpretation of the constitution and laws of the state. Yet, to sustain the contention of plaintiff in error, this court must decide that the amendment to the Oregon Constitution operated retrospectively, when the Supreme Court of Oregon has decided that it operated prospectively only. It must decide that the amendment applied to pending cases, when the Supreme Court of Oregon has decided that it applies only to charges brought subsequent to the adoption of the amendment. If the construction of the Supreme Court of Oregon is adopted it will not be denied that the prosecution of plaintiff in error has been with due process of law, but plaintiff asks the court to disregard the construction of the state court and construe the amendment adversely to the said court and hold that the amendment as thus construed will

deprive plaintiff of his liberty without due process of law contrary to the federal constitution. In view of the authorities cited, this the court will not do. No federal question, therefore, is raised by the first assignment of error, and if the court takes jurisdiction it must be by reason of the other assignments.

Assignment No. 2—Ex Post Facto Law.

As we stated before, this question was not raised in the Supreme Court of Oregon and is not properly before this court, but if it were properly here it would be unavailing to plaintiff in error, as a brief examination will show. It will be observed that it is alleged in the information that the crime was committed on the 9th day of September, 1907, but that Chapter 135 of the Laws of 1907, complained of as an **ex post facto** law, became effective May 26, 1907, more than three months prior to the alleged commission of the crime. As was stated by Mr. Justice Miller in Kring v. Missouri, 107 U. S. 225, "the term **ex post facto** necessarily implies a fact or act determined, after which the law in question is passed. Whether it is **ex post facto** or not relates in criminal cases, to which alone the phrase applies, to the time at which the offense charged was committed. If the law complained of was passed before the commission of the act with which the prisoner is charged it cannot, as to that offense, be an **ex post facto** law. If passed after the commission of the offense it is as to that, **ex post facto**,

though whether of the class forbidden by the constitution may depend on other matters. But so far as this depends on the time of its enactment, it has reference solely to the date at which the offense was committed to which the new law is sought to be applied. No other time or transaction but this has been in any adjudged case held to govern its ex post facto character."

The law of 1907 is not an ex post facto law if it is not a criminal or penal statute as far as plaintiff in error is concerned. It is true the act makes it a crime and prescribes a penalty for the state treasurer to make a profit out of loaning the state's money, but it does not make criminal nor prescribe any penalty for any of the acts charged against the plaintiff in error in the information. The only relation that that act had to the prosecution of plaintiff in error was that it showed that plaintiff in error held the state's money as a trustee and not as a debtor. Plaintiff in error was accused under Section 1807 of Bellinger & Cotton's Annotated Codes and Statutes of Oregon for converting to his own use money belonging to the State of Oregon. The acts charged in the information were in no wise prohibited by the law of 1907, which is claimed to be ex post facto, nor was any penalty prescribed for committing any of the acts charged in the information. The only provision of the act penal in its nature was a prohibition against the loaning of money by the state treasurer. The act, so far as it relates

to the prosecution of the plaintiff in error, is not penal or criminal, and therefore cannot be for that reason an **ex post facto** law.

It may be claimed by plaintiff in error that although the law of 1907 was passed before the date of the alleged crime, yet the effect given to it by the Supreme Court of Oregon in affirming the conviction of plaintiff in error was **ex post facto**, for the reason that the decision conflicted with the decision of the Supreme Court of Oregon in the case of Baker v. Williams, which latter case was decided prior to the alleged commission of the crime. This contention cannot be sustained for the reason that whether a law is **ex post facto** or not is determined solely by the time of the enactment of the law with reference to the alleged crime and not by the date of any judicial decision construing the law. The language of the constitution is that no state shall pass an **ex post facto** law. We think that this refers to a legislative enactment and not to a judicial decision. It has been uniformly held by this court that the prohibition against a state passing a law impairing the obligation of a contract referred to a legislative act and not a judicial opinion. The provisions that no state shall pass an **ex post facto** law, and that no state shall pass a law impairing the obligation of a contract are contained in the same clause of the federal constitution, and if one clause refers to a legislative enactment we can perceive no reason why the other should not. But in

any event the rule laid down in Baker v. Williams could not apply, for, as said by the Supreme Court of Oregon in deciding plaintiff's appeal, "the question involved here did not arise in that case and could not, as we are now controlled by the statute of 1907."

Assignment No. 3—Impairing the Obligation of a Contract.

The unsoundness of plaintiff's claim under this assignment is sufficiently demonstrated by a mere statement of it. It is that prior to the passage of the depository law the Trust Company had on deposit a portion of the funds of the State of Oregon; that under the authority of Baker v. Williams, 42 Ore. 213, supra, this was not a special but a general deposit, title to which passed to the company; that the relation between the company and the state was that of debtor and creditor, and not that of trustee and cestui que trust, and that therefore the funds, deposited as they were, could not be the subject of conversion; that the subsequent passage of the depository law, as construed by the Supreme Court of Oregon, changed this relation and made the deposit a special one, title to which remained in the state, so that instead of debtor the Trust Company became a trustee of the state funds with the result that a failure to pay over the same on demand would amount to a conversion within Section 1807 of the code under which the information

was brought; that this law as so construed impaired the obligation of the contract of deposit that had theretofore existed between the Trust Company and the state, and was repugnant to the federal constitution.

This question was raised for the first time in the petition for a writ of error, and is not properly before this court, as we have already shown. But, passing this objection without further argument, we will see what there is in plaintiff's contention.

The educational funds which plaintiff was charged with converting were deposited after the depository law went into effect, and that law became a part of the contract entered into by the state treasurer and the Trust Company. It could not impair the obligation of any contract unless a contract existed at the time the law became effective. It is the legislative act that must be subsequent to the contract and not a judicial decision construing the act, and such is the rule laid down by the decisions of this court. In the case of Turner v. Board of Commissioners, Wilkes County, 173 U. S. 461 (43 L. Ed. 768), we quote from the opinion as follows:

"The bondholders have brought the case here, claiming that by the decision below their contract has been impaired because, as they allege, the Supreme Court of the state had decided before these bonds were issued that the acts under which they were issued were valid laws and authorized their

issue, and that in holding the contrary after the issue of these bonds the state court had impaired the obligation of the contract, and its decision raised a federal question proper for review by this court.

"But in this case we have no power to examine the correctness of the decision of the Supreme Court of North Carolina because, this being a writ of error to a state court, we cannot take jurisdiction under the allegation that a contract has been impaired by a decision of that court when it appears that the state court has done nothing more than construe its own constitution and statutes existing at the time when the bonds were issued, there being no subsequent legislation touching the subject."

In the case of New Orleans Water Works Company v. Louisiana Sugar Refining Company, 125 U. S. 18 (31 L. Ed. 607), Mr. Justice Gray delivered the opinion of the court and said:

"In order to come within the provision of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of the contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state and not at the decisions of its court or the acts of administrative or executive boards or officers, or the doings of corporations or individuals."

We quote from Bacon v. Texas, 163 U. S. 216 (41 L. Ed. 136), as follows:

"Where the federal question upon which the jurisdiction of this court is based arose out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause of the constitution, and so as to give this court jurisdiction on writ of error to a state court by some subsequent statute of the state which has been upheld or effect given it by the state court."

The same rule is laid down in the case of Central Land Company v. Laidley, 159 U. S. 103 (40 L. Ed. 91). A portion of the opinion is as follows:

"In order to come within the provision of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of a contract, not only must the obligation of the contract have been impaired, but it must have been impaired by some act of the legislative power of the state and not by a decision of its judicial department only."

Besides, in this case there was no contract that could be impaired. If prior to the depository law the deposit was general, as plaintiff claims it was, then the obligation of the Trust Company was to pay the money on the demand of the state. When the Legislative Assembly passed the depository law it in effect prohibited a general deposit of the educational funds, and was equivalent to a demand

on the Trust Company for the money it had on general deposit. By the operation of this law, then, the contract of general deposit was terminated and the Trust Company, by retaining the funds thereafter, became a trustee, and the title to the funds was in the state. If the state treasurer could terminate the contract of general deposit by a direct demand on behalf of the state, surely the legislature could terminate it by a law.

But if the law itself did not terminate the contract the Trust Company and the state treasurer did. On June 3, 1907, the treasurer withdrew the educational funds that were on general deposit and deposited them with the other funds with the Trust Company in a special account, designated by it "educational." In so doing both the treasurer and the company recognized the depository law and acted under its provisions, and the Supreme Court of Oregon so decided. This disposes of all the questions presented in the assignment of errors.

Respectfully submitted,

Geo. E. Cameron

A. M. Crawford atty gen'l

Martin L. Pipes

Attorneys for Defendants in Error.

NOTICE.

Sirs—Please take notice that upon the annexed verified statement of facts herein, and upon all the papers and proceedings herein, I shall submit to the Supreme Court of the United States at a stated term thereof, on Monday the 14th day of October, 1912, at the Capitol in the City of Washington, in the District of Columbia, at the opening of the court on that day, or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy, and that I shall submit with said motion and in support of the same the argument and statement of facts annexed thereto.

Martin L. Pipes

Of Attorneys for Defendant in Error.

Portland, Oregon, ~~March~~ June 27 1912.

To

Wallace McCamant, Electric Building, Portland, Oregon.

William D. Guthrie, 44 Wall street, New York, N. Y.

Anthony Higgins, Ford Building, Wilmington, Delaware.

State of Oregon, County of Multnomah, ss.

I, Martin L. Pipes, one of the counsel for defendant in error, being first duly sworn, depose and say that I served the foregoing motion, statement

of facts, argument, brief and notice upon Wallace McCamant, one of the attorneys for plaintiff in error, by delivering to him personally at Portland, Oregon, on the 28. day of June, 1912, true copies thereof, certified by me to be such, and that I served the said papers upon William D. Guthrie and Anthony Higgins, counsel for plaintiff in error, by depositing true copies thereof, duly certified by me as such, in the postoffice at Portland, Oregon, on the 28. day of June, 1912, with postage thereon prepaid, said copies being directed to each of said counsel at their respective places of address as follows: To William D. Guthrie, 44 Wall street, New York, N. Y.; to Anthony Higgins, Ford Building, Wilmington, Delaware.

Marion L. Pope

Subscribed and sworn to before me this 28. day of June, 1912.

(Signed) A. M. Cannon,

Notary Public for Oregon.

Clerk United States District Court
District of Oregon

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ROSS *v.* STATE OF OREGON.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 75. Argued December 6, 1912.—Decided January 27, 1913.

The prohibition in § 10 of Article I of the Constitution against *ex post facto* laws is a restraint upon the legislative power of the States and concerns the making of laws and not their construction by the courts.

While that prohibition is directed against legislative acts, and reaches every form in which the legislative power acts, and while a judicial decision is the act of an instrumentality of the State, if the purpose of that decision is not to prescribe a new law for the future but only to apply laws in force at the time to completed transactions, the ruling is a judicial and not a legislative act, and no Federal right or

question is involved under the *ex post facto* provision of the Constitution.

The purpose of a judicial inquiry is to enforce laws as they are at present; legislation looks to the future and changes existing conditions by making new laws to be applicable hereafter. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226.

Whether an amendment to the state constitution requiring prosecutions for crime to be based on indictment applies to pending cases is a question of local law and the decision of the state court is not reviewable here; and the decision of that court that such an amendment did not repeal the statute under which a prosecution based on an information already instituted does not deprive plaintiff in error of his liberty without due process of law under the Fourteenth Amendment of the Federal Constitution and no Federal question is involved giving this court jurisdiction to review the judgment of conviction.

Where the record presents no Federal question, the writ of error must be dismissed and this court cannot discuss the merits of the questions presented and determined in the state court.

Writ of error to review 55 Oregon, 450, dismissed.

THE facts, which involve the jurisdiction of this court to review judgments of the state courts under § 709, Rev. Stat., and what constitutes an *ex post facto* law, are stated in the opinion.

Mr. William D. Guthrie, with whom *Mr. Wallace McCamant* was on the brief, for plaintiff in error:

Federal questions were duly raised in the state court. *Beardsley* v. *N. Y., L. E. & W. R. R. Co.*, 162 N. Y. 230; *Baker* v. *Williams & England Banking Co.*, 42 Oregon, 213; *Blythe* v. *Hinckley*, 180 U. S. 333; *Forbes* v. *State Council of Virginia*, 216 U. S. 396; *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Harding* v. *Illinois*, 196 U. S. 78; *McCorquodale* v. *Texas*, 211 U. S. 432; *Muhlker* v. *Harlem R. R. Co.*, 197 U. S. 544; *Water Power Co.* v. *Street Railway Co.*, 172 U. S. 475; *Yazoo & Miss. Rd. Co.* v. *Adams*, 180 U. S. 41.

The decision of a court may constitute an *ex post facto* law. *Bailey* v. *Alabama*, 219 U. S. 219; *Bendey* v. *Townsend*, 109 U. S. 665; *Bors* v. *Preston*, 111 U. S. 252; *Boyd*

v. *United States*, 116 U. S. 616; *Brown* v. *Maryland*, 12 Wheat. 419; *Bucher* v. *Cheshire Rd. Co.*, 125 U. S. 555; *Burgess* v. *Salmon*, 97 U. S. 381; *Butz* v. *City of Muscatine*, 8 Wall. 575; *Capital Traction Co.* v. *Hof*, 174 U. S. 1; *C., B. & Q. R. R.* v. *Chicago*, 166 U. S. 226; *Cross Lake Club* v. *Louisiana*, 224 U. S. 632; *Cummings* v. *Missouri*, 4 Wall. 277; *Douglass* v. *County of Pike*, 101 U. S. 677; *Dreyer* v. *Illinois*, 187 U. S. 71; *Ferris* v. *Higley*, 20 Wall. 375; *Fitzpatrick* v. *Simonson Bros. Mfg. Co.*, 86 Minnesota, 140; *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Hinde* v. *Vattier*, 5 Pet. 398; *Kring* v. *Missouri*, 107 U. S. 221; *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349; *Lorings* v. *Marsh*, 6 Wall. 337; *Louisiana* v. *Pilsbury*, 105 U. S. 278; *Muhlker* v. *Harlem R. R. Co.*, 197 U. S. 544; *Nashua Savings Bank* v. *Anglo-American Co.*, 189 U. S. 221; *Nelson* v. *Kerr*, 2 T. & C., 299; 59 N. Y. 224; *People ex rel. Steward* v. *Railroad Commissioners*, 160 N. Y. 202; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210; *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20; *Scott* v. *McNeal*, 154 U. S. 34; *Smith* v. *United States*, 1 Gall. 261; *Soliah* v. *Heskin*, 222 U. S. 522; *State* v. *Clark*, 9 Oregon, 466; *State* v. *Dyer*, 67 Vermont, 690; *State* v. *O'Neil*, 147 Iowa, 513; *United States* v. *Wong Kim Ark*, 169 U. S. 649; *Ex parte Virginia*, 100 U. S. 339; *Virginia* v. *Rives*, 100 U. S. 313; *Westinghouse Air Brake Co.* v. *Kansas City So. Ry. Co.*, 137 Fed. Rep. 26; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

There is no room for the construction of a statute if there be no reasonable ambiguity. *Hamilton* v. *Rathbone*, 175 U. S. 414; *Sarlls* v. *United States*, 152 U. S. 570; *State* v. *Mann*, 2 Oregon, 238; *The Ben R.*, 134 Fed. Rep. 784; *United States* v. *Brewer*, 139 U. S. 278; *United States* v. *Chase*, 135 U. S. 255; *United States* v. *Goldenberg*, 168 U. S. 95; *United States* v. *Sharp*, Peters C. C. 118; *United States* v. *Wiltberger*, 5 Wheat. 76.

The facts show the arbitrary character of the statu-

tory construction and the *ex post facto* operation of the law enforced by the court below. *Bank of the Republic* v. *Millard*, 10 Wall. 152; *Baker* v. *Williams & England Banking Co.*, 42 Oregon, 213; *Henry County* v. *Salmon*, 201 Missouri, 136; *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. 96; *Lloyd* v. *Matthews*, 155 U. S. 222; *Phœnix Bank* v. *Risley*, 111 U. S. 125; *State* v. *Bartley*, 39 Nebraska, 353; *State* v. *Minn. & St. L. Ry. Co.*, 88 Iowa, 689; *State* v. *Vermont Cent. Rd. Co.*, 30 Vermont, 108; *State* v. *Wabash Ry. Co.*, 115 Indiana, 466; *Thompson* v. *Riggs*, 5 Wall. 663.

Jurisdiction is an essential element of due process of law under the Fourteenth Amendment. *Ex parte Bain*, 121 U. S. 1; *Ex parte Bergman*, 130 S. W. Rep. 174; *Bradley* v. *Union Bridge & Construction Co.*, 185 Fed. Rep. 544; *Commonwealth* v. *Duane*, 1 Binney, 601; *Commonwealth* v. *Kimball*, 21 Pick. 373; *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Drinkall* v. *Spiegel*, 68 Connecticut, 411; *Garnsey* v. *State*, 4 Okla. Cr. 547; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Hartung* v. *The People*, 22 N. Y. 95; *Matter of Hope*, 7 N. Y. Cr. 406; *Howard* v. *State*, 5 Indiana, 183; *Hubbard* v. *State*, 2 Tex. App. 506; *Hurtado* v. *California*, 110 U. S. 516; *Keller* v. *State*, 12 Maryland, 322; *Kenyon* v. *State*, 31 Texas Cr. 13; *Montague* v. *State*, 54 Maryland, 481; *People* v. *Tisdale*, 57 California, 104; *Scott* v. *McNeal*, 154 U. S. 34; *Sheppard* v. *State*, 1 Tex. App. 522; *Speckert* v. *City of Louisville*, 78 Kentucky, 287; *State* v. *Allen*, 14 Washington, 103; *State* v. *Daley*, 29 Connecticut, 272; *State* v. *Ingersoll*, 17 Wisconsin, 651; *State* v. *Ju Nun*, 53 Oregon, 1; *State* v. *King*, 12 La. Ann. 593; *State* v. *Kingsly*, 10 Montana, 537; *State* v. *Langworthy*, 55 Oregon, 303; *State* v. *Mason*, 108 Indiana, 48; *State* v. *Schluer*, 59 Oregon, 18; *Tuton* v. *State*, 4 Tex. App. 472; *Twining* v. *New Jersey*, 211 U. S. 78; *United States* v. *London*, 176 Fed. Rep. 976; *Wall* v. *State*, 18 Texas, 682; *Ex parte Wilson*, 114 U. S. 417.

Mr. A. M. Crawford, Attorney General of the State of Oregon, *Mr. George J. Cameron* and *Mr. Martin L. Pipes*, for defendant in error, submitted:

The Supreme Court has no jurisdiction to review the decision of a state court except upon a Federal question specially set up or claimed in the state court. *Mutual Insurance Co. of New York* v. *McGrew*, 188 U. S. 291; *Michigan Sugar Co.* v. *Dix*, 185 U. S. 112; *Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 648.

The construction given to a statute or constitution of the State by the highest court of such State is regarded as part of the statute or constitution, and is as binding as the text upon the Supreme Court of the United States. *Leffingwell* v. *Warren*, 2 Black, 595; *Russell* v. *Ely*, 2 Black, 575; *Oaks* v. *Mace*, 165 U. S. 363; *Stone* v. *Wisconsin*, 94 U. S. 181; *Sumner* v. *Hicks*, 2 Black, 352; *Adams* v. *Nashville*, 95 U. S. 19; *Nobles* v. *Georgia*, 168 U. S. 398; *New York, L. E. & W. R. Co.* v. *Pennsylvania*, 158 U. S. 431; *Baltimore Traction Co.* v. *Baltimore Belt R. Co.*, 151 U. S. 137; *Olcott* v. *Fond du Lac Co.*, 16 Wall. 678; *Missouri, K. & T. R. Co.* v. *McCann*, 174 U. S. 586; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *Tullis* v. *Lake Erie & Western R. Co.*, 175 U. S. 348; *Iacardi* v. *Alabama*, 19 Wall. 635; *Fairfield* v. *Gallatin Co.*, 100 U. S. 47; *Morley* v. *Lake Shore & Michigan Southern R. Co.*, 146 U. S. 162; *Louisiana* v. *Pillsbury*, 105 U. S. 294.

The construction of the state court that a statute under which a person has been convicted is prospective only will be followed in the Federal court on the question whether or not the statute is an *ex post facto* law. *Jaehne* v. *New York*, 128 U. S. 190; *In re Jaehne*, 35 Fed. Rep. 357.

An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed. *Calder* v. *Bull*, 3 Dall. 386; *Mallet* v. *North Carolina*, 181 U. S. 590.

The constitutional provision against *ex post facto* laws applies only to criminal or penal statutes. *Ogden* v. *Sanders*, 12 Wheat. 213; *League* v. *Texas*, 184 U. S. 161; *Calder* v. *Bull, supra; Locke* v. *New Orleans*, 4 Wall. 172.

The constitutional provision that no State shall pass an *ex post facto* law refers to a legislative enactment and not to a judicial decision.

A contract can only be impaired within the meaning of the United States Constitution so as to give this court jurisdiction on writ of error to a state court by some subsequent statute of the State which has been upheld or given effect by the state court. *Bacon* v. *State of Texas*, 163 U. S. 207; *New Orleans Water Works Co.* v. *Louisiana Sugar Ref. Co.*, 125 U. S. 118; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 109; *Turner* v. *Board of Commissioners of Wilkes County*, 173 U. S. 461.

The Federal Supreme Court will not hold a state statute void on the ground that it impairs the obligation of contracts unless it impairs the obligation of the particular contract which is involved in the controversy. *Lehigh Water Co.* v. *Easton*, 121 U. S. 388.

Mr. Justice Van Devanter delivered the opinion of the court.

This was a criminal prosecution in the State of Oregon, instituted by an information charging the defendants, of whom the plaintiff in error was one, with having converted to their own use a large sum of money belonging to the State's Irreducible School Fund, Agricultural College Fund and University Fund, collectively spoken of as educational funds, then held for safe-keeping in a bank of which the defendants were in control as its officers and directors. Upon a separate trial of the plaintiff in error he was convicted and sentenced to a term of imprisonment and to pay a fine. An appeal to the Supreme Court of the State resulted in the elimination of the fine and in the

affirmance of the judgment in other respects. 55 Oregon, 450. The plaintiff in error then brought the case here, claiming that rights secured to him by the Constitution of the United States, and specially set up in the Supreme Court of the State, were denied by the judgment of affirmance.

Briefly outlined, the case, as we must take it to be, is as follows: In June, 1907, the bank became an "active depository" under a statute of the State presently to be mentioned, and thereupon an account was opened with the bank as such depository in the name of the state treasurer, with the added designation "educational." The deposits going into the account consisted of checks and drafts belonging to the State's educational funds, and the money collected by the bank on these checks and drafts, less what was drawn out by the State, amounted on November 6, 1907, to $288,426.87. On that day the bank failed, and it was then disclosed that on August 21 the total cash in the bank was $296.19 short of the amount called for by the account and that this shortage had continued and increased until the day of the failure, when it reached $274,882.73. The defendants had not literally appropriated any of the money to their personal use, but, knowing that it belonged to the State's educational funds and was received and held by the bank as an active depository, had permitted it to be commingled with other deposits and funds and had sanctioned its use in paying liabilities of the bank.

The prosecution was founded upon § 1807 of Bellinger & Cotton's Codes of Oregon, which declares: "If any person shall receive any money whatever for this State, . . . or shall have in his possession any money whatever belonging to such State, . . . and shall in any way convert to his own use any portion thereof, . . . such person shall be deemed guilty of larceny."

By an act taking effect May 26, 1907, Laws of 1907, c. 135, p. 248, the legislature of the State provided for the designation of "State depositories for the purpose of receiving on deposit funds of this State, and paying out the same on order or checks of the State treasurer" (§§ 1, 2); made it the duty of the treasurer to "deposit and at all times keep on deposit" in such depositories the "money in his hands belonging to the several funds in the State treasury," excepting a reserve of not to exceed $100,000 with which to pay current obligations (§ 3); required each depository to pay interest on deposits of such funds at not less than two per cent. per annum (§§ 3, 4) and to give approved security "for the payment of such deposits and the interest thereon" (§ 5); and made the following declaration relating to educational funds (§ 16): "The word 'funds' used in this act shall apply to all funds in the State treasury except the common school,[1] agricultural college, and university funds."

The same act authorized the designation of "an active depository for the collection of any drafts, checks, certificates of deposit and coupons that may be received by him [the treasurer] on account of any claim due the State" (§ 6); required such depository to give approved security "for the prompt collection of all drafts, checks, certificates of deposit, or coupons that may be delivered to such active depository by the State treasurer for collection; also, for the safekeeping and prompt payment on the State treasurer's order of the proceeds of all such collections" (§ 7); and in that connection provided (§ 8): "The State treasurer, on receipt of any draft, check or certificate of deposit, on account of State dues, may place the same in such active depository for collection, and it shall be the

[1] The common school fund and the irreducible school fund appear to have been identical. Ore. Const., Art. VIII, § 2; Ore. Laws 1907, c. 117, § 36.

duty of such active depository to collect the same without delay, without charge for its services for such collection, or for exchange, and to notify the State treasurer when collected. The compensation to be paid by such active depository shall be fixed by the State treasurer upon the best terms obtainable for the State." The word "funds" particularly defined in § 16, as before quoted, was not used in any of the sections having special relation to the active depository.

Before the passage of the depository act the Supreme Court of the State had occasion to consider and determine, in *Baker* v. *Williams Banking Co.*, 42 Oregon, 213, 222-225, whether, in view of § 1807 of Bellinger & Cotton's Codes (then § 1772, Hill's Ann. Laws), the state treasurer lawfully could make a general deposit in a bank of money of the State belonging to its educational funds, and it was held that he could, the court saying:

"It is made a felony by statute for any person having in his possession any money belonging to the State, county, town, or other municipality to convert to his own use or loan the same, with or without interest (Hill's Ann. Laws, § 1772); and, while a mere deposit in a bank for safe-keeping is not inhibited by this provision, it is manifest that in case of the failure of the bank the officer is not entitled to interest in his own right on the fund so deposited, whatever the right of the State or municipality might be in the premises. If, therefore, the claims are in fact for public money, as the objectors allege, no interest should be allowed thereon. A public officer may not loan, with or without interest, any part of the public funds in his possession, without being guilty of a felony; but he is required to keep such funds safely, and for that purpose may deposit them in a bank, provided they are at all times subject to his order, and there is no fixed period during which he has no right to demand their return. . . . The deposit is made on his own personal responsibility,

however; and if, in the case of the failure of the bank, he makes the loss good, the money deposited must necessarily become his property, and thereafter be considered and treated as such."

After that decision and before the transactions here in question the depository act was passed and put in force, but its construction and operation were not determined by the Supreme Court of the State until it passed upon the case at bar. It was then held (a) that the act made provision for general depositories, wherein moneys of the State, not belonging to the educational funds, were to be placed as general deposits, with the right in the depository to commingle them with other deposits and to loan them in the usual course of business, and with an absolute obligation on the depository to pay interest on them at not less than two per cent. per annum; (b) that the act also made provision for an active depository for the collection of checks, drafts and the like, belonging to any state fund, whether educational or otherwise, and the safe-keeping of the proceeds subject to the treasurer's order, but with no right in the depository to commingle them with other deposits or to loan them, and with no specific or absolute obligation on the depository to pay interest thereon; (c) that by contrasting the provisions relating to general depositories with those relating to the active depository it was evident that deposits in the latter, unlike deposits in the former, were to be special, the title not passing to the depository but remaining in the State; and (d) that the act operated, and the legislature intended, to take the educational funds out of the custom or right of the treasurer to make general deposits which was recognized in *Baker* v. *Williams Banking Co.*, *supra*. Then coming to apply the act, as so construed, together with § 1807, to the facts of the case as reflected by the verdict of the jury, it was further held (1) that the bank held the money as a special deposit, the title being in the State; (2) that the

defendants, being in control of the bank as its officers and directors and knowing of the deposit, were to be regarded as having the money in their possession within the meaning of § 1807; (3) that the commingling of the money with other deposits and the using of it in paying liabilities of the bank constituted an unlawful appropriation of it; and (4) that as the defendants, as controlling officers and directors of the bank, sanctioned that appropriation, knowing that the money belonged to the educational funds of the State and was held by the bank as an active depository, they thereby converted the money to their own use within the meaning of § 1807, even although the appropriation was for the benefit of the bank and not of themselves personally.

It will be perceived that but for the depository act, as so construed, the deposit would have been a general one, merely creating the relation of debtor and creditor between the bank and the State, and the commingling and use of the money in the manner shown would not have been a crime under § 1807.

The record shows that the plaintiff in error contended in the Supreme Court of the State that the depository act was not reasonably susceptible of the construction ultimately adopted, and that to put such a construction upon it would be violative of the prohibition in the Constitution of the United States against *ex post facto* state laws. Both phases of the contention were denied, the second necessarily failing with the first, and the plaintiff in error now assigns error upon that holding and complains that it deprived him of a right secured by the Constitution.

Bearing in mind what has been said, and especially that the depository act and § 1807 were both in force at the time of the alleged offense, it will be perceived that the real complaint which we are asked to consider is, not that the Supreme Court of the State in any wise

rested its judgment upon a statute passed after the time of the alleged offense, but only that it misconstrued a preëxisting statute to the disadvantage of the plaintiff in error and that such a decision is an *ex post facto* law within the meaning of Art. I, § 10, of the Constitution, which declares: "No State . . . shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

But that provision of the Constitution, according to the natural import of its terms, is a restraint upon legislative power and concerns the making of laws, not their construction by the courts. It has been so regarded from the beginning. In *Calder* v. *Bull*, 3 Dall. 386, one of the first cases in which the provision was considered, it was spoken of as reaching legislative, but not judicial, acts; and in *Fletcher* v. *Peck*, 6 Cranch, 87, 138, Chief Justice Marshall said of it: "In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained." True, neither of those cases turned upon the question whether the words "no State shall pass a law" embrace a decision of a court construing a statute, but that question was both presented and decided in *Commercial Bank* v. *Buckingham's Executors*, 5 How. 317. There the Supreme Court of Ohio, in an action upon a contract, had put upon two preëxisting statutes of the State a construction which was claimed to be unreasonable and to impair the obligation of the contract, and it was sought to have that decision reviewed by this court on the ground that it denied a right secured by the Constitution of the United States. But the writ of error was dismissed for want of jurisdiction, because, as was said in the opinion (p. 342): "If this court were to assume jurisdiction of this case, it is evident that the question submitted for our decision would be, not whether the statutes of Ohio are repugnant to the constitution of the United States, but whether the Supreme Court of

Ohio has erred in its construction of them. It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretence that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary." A like question was presented, and similarly disposed of, in *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18, 30, where it was said: "In order to come within the provision of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals." And in *Brown* v. *Smart*, 145 U. S. 454, 458, where a decision of the Court of Appeals of Maryland, expounding a statute of that State, was challenged as impairing the obligation of a contract made after the statute came into existence, it was held that the decision "was not a law" within the meaning of the provision against the impairment of contractual obligations by state laws. Many other cases give effect to this ruling, but it will suffice to cite, from among them, *Central Land Co.* v. *Laidley*, 159 U. S. 103, 109; *Bacon* v. *Texas*, 163 U. S. 207, 220; *Hanford* v. *Davies*, *Ibid.* 273, 278; *Turner* v. *Wilkes County*, 173 U. S. 461; *Cross Lake Shooting & Fishing Club* v. *Louisiana*, 224 U. S. 632, 638.

But whilst thus uniformly holding that the provision is directed against legislative, but not judicial, acts, this court with like uniformity has regarded it as reaching

every form in which the legislative power of a State is exerted, whether it be a constitution, a constitutional amendment, an enactment of the legislature, a by-law or ordinance of a municipal corporation, or a regulation or order of some other instrumentality of the State exercising delegated legislative authority. *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co., supra; St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 148; *Davis & Farnum Manufacturing Co.* v. *Los Angeles*, 189 U. S. 207, 216; *Grand Trunk Railway Co.* v. *Railroad Commission of Indiana*, 221 U. S. 400, 403. Of course, the ruling here in question was by an instrumentality of the State, but as its purpose was, not to prescribe a new law for the future, but only to apply to a completed transaction laws which were in force at the time, it is quite plain that the ruling was a judicial act and not an exercise of legislative authority. As was said in *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226: "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

The plaintiff in error cites the cases of *Kring* v. *Missouri*, 107 U. S. 221; *Muhlker* v. *New York & Harlem Railroad Co.*, 197 U. S. 544; *Louisiana* v. *Pilsbury*, 105 U. S. 278; *Gelpcke* v. *Dubuque*, 1 Wall. 175, and *Butz* v. *City of Muscatine*, 8 Wall. 575, as holding that a judicial decision may be a law in the sense of the constitutional provision which he invokes. But none of those cases, when rightly considered, sustains that position. The first was a criminal case in which a provision in a new constitution was held to be an *ex post facto* law as to an offense theretofore committed; the second presented the question whether a state statute of 1892 impaired contractual obligations

created by deeds of a much earlier date; the third and fourth were explained in *Central Land Co.* v. *Laidley*, 159 U. S. 103, 111–112; *Bacon* v. *Texas*, 163 U. S. 207, 221–223, and *Turner* v. *Wilkes County*, *supra*, and were there shown not to be in conflict with other cases on the subject, and the fifth is in no wise distinguishable from the fourth.

We conclude that no Federal right was involved in the ruling respecting the construction of the depository act.

The prosecution was instituted by an information conformably to a law of the State in force at the time. Bellinger & Cotton's Codes, § 1258. Following the judgment of conviction, and while the case was pending on appeal, a constitutional amendment was adopted, declaring: "No person shall be charged in any circuit court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this State, except upon an indictment found by a grand jury." The plaintiff in error thereupon advanced the contention that the constitutional amendment worked a repeal of the statute under which the information was filed and made it impossible to enforce the judgment against him without depriving him of his liberty without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. The state court ruled that the amendment to the state constitution was prospective and did not affect pending cases. Error is now assigned upon that ruling. But it involved nothing more than the construction of the constitutional amendment, which was a question of local law, and its decision by the state court is not reviewable here.

As the record presents no Federal question, we are without jurisdiction to review the judgment, and therefore cannot enter into the merits of the questions that were presented and determined in the state court.

Writ of error dismissed.